TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 998.

THE FLAGSTAFF SILVER MINING COMPANY OF UTAH (LIMITED), PLAINTIFF IN ERROR,

vs.

HELEN TARBET.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED NOVEMBER 20, 1879.

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INDEX.

	Original.	Print.
Answer	10	6
Assignment to Helen Tarbet	36	22
Assignment of errors	80	49
Complaint	1	1
Cullin testimony	50	30
Callahan testimony	53	32
Exceptions to instructions	70	43
Exceptions to verdict, etc	79	49
Hirschman testimony	55	34
Instructions	67	41
Judgment	27	17
Jury	23	14
Mining laws	35	21
Motion for injunction	19	12
Motion for non-suit	24	14
" "	54	33
Motion for stay of proceedings	29	17
Motion to strike out testimony of Thomas Marshall	48	29
" " " "	64	39
Motion for new trial	30	18
Martin testimony	53	32
New trial, statement on	31	19
Notice of intention	79	48
Notice of Titus re-location	34	20
Notice of Flagstaff claim	62	38

	Original.	Print.
Notice of South Star and Titus Mine	82	50
Order to show cause	19	12
Order overruling injunction	21	13
Order of substitution	21	13
Order dismissing certain defendants	22	14
Order denying perpetual injunction	29	17
Order denying new trial	30	18
Palmer testimony	49	30
Tarbet, Alex., testimony	37	22
Treweek, challenge to	32	19
By-laws of Little Cottonwood District	97	60
By-laws of Mountain Lake District	112	69
Map	125	78
Proceedings in Supreme Court	126	79
Judgment	129	80
Writ of error	131	80
Clerk's certificate	132	81
Stipulation to correct writ of error	133	81

a Be it remembered, that on the 29th day of December, A. D. 1877, there was filed in the office of the clerk of the Supreme Court of the Territory of Utah a transcript of the record and proceedings in and of the district court of the third judicial district of said territory, in a certain cause in which Helen Tarbet, assignee of Alex. Tarbet, was plaintiff, and The Flagstaff Silver Mining Company, of Utah (limited), et al., were defendants, which said transcript was in the words and figures following, to wit:

*a*½ (On cover:) Supreme Court, Utah Territory. January term, 1878. Helen Tarbet, (assignee of Alex. Tarbet,) respondent, vs. The Flagstaff Silver Mining Company, of Utah (limited), et al., appellants. Transcript. Filed Dec. 29th, A. D. 1877, in my office. E. T. Sprague, clerk Sup. Court.

1 Territory of Utah. In the Third District Court. County of Salt Lake.

ALEXANDER TARBET, PLAINTIFF,
vs.
THE FLAGSTAFF SILVER MINING COMPANY (limited), Irwin Davis, J. N. H. Patrick, Matthewson T. Patrick, Algernon G. Patrick, and George Cullens, Defendants.

The above-named plaintiff, complaining, alleges that he is, and for the last ten years past has been, a citizen of the United States; that the said defendant, the Flagstaff Silver Mining Company (limited), is a foreign corporation, organized under the laws of the kingdom of Great Britain, and doing business in the said county and territory; that the christian name of the defendant, J. N. H. Patrick, is to the plaintiff unknown; that subject to the paramount title of the United States, the plaintiff is, and for many years last past has been, the owner, the possessor, and entitled to the possession of an interest in "The South Star and Titus Mine," situate in Little Cottonwood Mining District, in said county and territory; that such interest therein was, and is, three-fourths undivided
2 interest of, in, and to six hundred and ten feet in length of the whole width of said mine; that is to say, three-fourths undivided interest of, in, and to claims number one (1), two (2), and (3), extending northwesterly from the discovery point and shaft, and ten feet in length on claim number one (1), extending southwesterly from the said discovery point and shaft of the said mine; that the said "South Star and Titus Mine," and the plaintiff's said interest therein, contains and consists of deposits, veins, leads, ledges, and lodes of ore and rock in place bearing valuable minerals, to wit: iron, lead, silver, gold, and other minerals; that the location of the said mine, showing among other things the said claim of which the

plaintiff is part owner, as aforesaid, is duly recorded in the office of the recorder of the said Little Cottonwood Mining District, and in the office of the recorder of said county; that a plat showing the location of the said six hundred and ten feet in the said mine is hereto annexed, marked Exhibit No. 1, and is made part of this complaint.

And further complaining, the plaintiff alleges that on or about the first day of January, 1873, and on divers other days since then, and within the last three years prior to the commencement of this action, and while he, the plaintiff, was so the owner, possessor, and entitled to the possession of the said three-fourths undivided interest of, in, and to the said six hundred and ten (610) feet of the said mine, the defendants forcibly broke and entered upon the plaintiff's said interest in said mine, and wrongfully and unlawfully, and against the will and consent of the plaintiff, took, carried away, and converted to their own use, large quantities, to wit: about twenty-five thousand tons of the said ore and rock in place, bearing iron, lead, silver, gold, and other minerals, the property of the plaintiff, and, as he is informed and believes, to his damage in the sum of one million dollars.

3 And for further cause of action, and for equitable relief herein, the plaintiff complaining alleges that he is, and for the last ten years past has been, a citizen of the United States; that the said defendant, the Flagstaff Silver Mining Company (limited), is a foreign corporation, organized under the laws of Great Britain, owning property, doing business, and having agents, servants, and employees, in the county of Salt Lake, Territory of Utah; that on January 1st, A. D. 1873, and ever since that date, this plaintiff was, and now is, the owner of, in the possession of, and entitled to, the possession of an interest, to wit: the undivided three-fourths, in and to the "South Star and Titus Mine," situate in Little Cottonwood Mining District, Salt Lake county, Utah territory, *i. e.*, the undivided three-fourths of, in, and to claims number one, two, and three of the Titus mine, extending northwesterly six hundred and ten feet from the discovery point and shaft of said "South Star and Titus Mine," on and along the Titus lode or vein of mineral, and ten feet in length on claim number one of the South Star lode, beginning at said discovery point of the South Star and Titus locations, and running therefrom southeasterly along the vein of said South Star lode, on claim number one ten feet; the said six hundred and ten feet along and on the vein of ore and the surface ground, to wit, one hundred feet on each side thereof, forming and constituting what is known and commonly called the "South Star and Titus Mine."

That the said mine, and plaintiff's said interest therein, contains and consists of, and is alone valuable for deposits, veins, lodes, ledges, and leads of ore and rock in place, bearing valuable minerals, to wit: iron, lead, silver, gold, and other minerals; that a plat

showing thereon, colored brown, the six hundred and ten feet, and the surface ground appurtenant and belonging thereto, is
4 hereto attached, marked Exhibit No. 1; that on or about January 1st, 1873, and on diverse and sundry days thereafter, and prior to the institution of this suit, and while he, said plaintiff, was so the owner of, in the possession of, and entitled to, the possession of the said undivided three-fourths of the mining ground aforesaid, the said defendants, not then or now being tenants in common with plaintiff, nor having right, title, or interest in said mine, forcibly broke and entered upon the plaintiff's interest in the said mine, and wrongfully, unlawfully, and against the will and consent of the plaintiff, took, carried away, and converted to their own use, large quantities of the said ore, to wit: about twenty-five thousand tons, rich in silver, gold, and lead, of the value of one million dollars, the property of the plaintiff; all this to the plaintiff's damage in the sum of one million dallars.

That until the second day of December, 1875, the plaintiff did not know, and had no reliable information that the defendants were trespassing upon and doing damage to his said property; that on that day or thereabouts, connection was first made between the plaintiff's workings and the defendant's workings in the plaintiff's said property; that such connection was made at a point in claim No. 1, northwesterly of the discovery shaft in the said "South Star and Titus Mine."

Amendment to complaint allowed by the court December 20, 1875. Filed December 21, 1875.

WM. H. BETTS, *Clerk.*

By WILLIS P. MCBRIDE, *Deputy Clerk.*

That the said defendants threaten to continue to extract, mine, take, and carry away, and convert to their own use, the valuable ores and minerals from the said "South Star and Titus Mine," thereby destroying the actual and only value of the said mine.
5 That said mine is only valuable for the minerals therein contained, and that the ores and minerals once extracted, taken, and carried away, this plaintiff would be irreparably damaged.

That the said defendants, or either of them, have not within the jurisdiction of this court, sufficient property to respond to the damages threatened and inflicted by their said wrongs and trespasses.

The plaintiff further says, that the location, appropriation, and occupation, in accordance with and by virtue of the rules, regulations, and customs of miners in Little Cottonwood Mining District, and the laws of the United States, of the said "South Star and Titus Mine," was by plaintiff's predecessors in interest duly made on or about the first day of October, A. D. 1867, and the said six hundred and ten feet, constituting the "South Star and Titus Mine," has ever since said date been worked, occupied, and possessed in accordance with the rules and customs of said mining

district, and with the laws of the United States, by the said locators or this plaintiff and his tenants in common, claiming under such locators, or by relocation, duly and properly made by plaintiff and his grantor; that the original notice of location of said "South Star and Titus Lode" was for a vein of mineral running in a course from said discovery northwesterly and southeasterly.

The defendants claim and assert, that thereafter, to wit, on the 19th day of March, A. D. 1870, the Flagstaff lode was located; and that on April 9, 1870, the same was recorded by their predecessors in interest of the defendants, the Flagstaff Silver Mining Company (limited); that the point of discovery of said Flagstaff lode was at a point midway and a short distance south of the southwest exterior line of claim number three (3) of the Titus lode, and is on Exhibit No. 1, hereto attached, marked "Flagstaff Discovery Shaft;" that in said notice of location, defendants'
6 grantors, under whom they claim title, claimed said Flagstaff lode, as a vein of mineral running from said point northerly and southerly.

That thereafter, to wit, on June 4th, A. D. 1870, the predecessor in interest and grantor of the said Flagstaff Silver Mining Company, (limited,) the Salt Lake Mining Company holding and claiming the said lode under and by virtue of mesne conveyance from the locators thereof, filed its application for a patent therefor in the United States land office in and for the Territory of Utah, asking for a patent for said lode, described as running from said discovery, north 36°, east 1,400 feet, and south 36°, west 1,200, as will more distinctly appear, marked Flagstaff Lot, No. 38, in red ink, on Exhibit No. 1, hereto attached, and had its survey and diagram of said lode made, posted, and advertised as required by law, in accordance with said application; that at the expiration of the time required by law, the said Salt Lake Mining Company had, and caused the said lode to be finally surveyed on a line south 45° 39′, east 1,020 feet, and north 45° 39′, west 1,400 feet from said discovery, or nearly at right angles with the original survey as posted and published; that said final survey was thereupon approved by the surveyor-general.

That thereupon the said Salt Lake Mining Company caused the said application for patent and final survey, and all papers appurtenant thereto, to be transmitted to the General Land Office at Washington city, for final action in the Land Department of the United States; and in said land department the said Salt Lake Mining Company claimed and demanded of the government of the United States a patent for a lode, as surveyed by said final survey, which would embrace within its limits the mining claims of plaintiff, heretofore described herein.

7 That after a full hearing before the Commissioner of the General Land Office, and thereafter on appeal to the Secretary of the Interior, and by the Land Department of the United States, said claim and demand was denied, and patent of the United

States was duly issued to the said Salt Lake Mining Company, the grantor of said defendant, the Flagstaff Silver Mining Company, (limited,) for the said mining ground as originally surveyed, and as the same will more clearly appear on Exhibit No. 1, hereto attached, marked thereon, "Flagstaff Lot, No. 38."

That the said defendants now claim, and for a long time past have claimed and pretended and contrary to equity and good conscience, do now claim and pretend, that under and by virtue of said patent of the United States, they, the said defendants, are of right entitled to all ores and minerals in the mining ground and claims of this plaintiff and his co-tenants, hereinbefore described, although in truth and fact the said ores and minerals are off and beyond the lines of the running ground patented as aforesaid to the Salt Lake Mining Company, and are in the grounds to which this plaintiff is entitled by his older and better right.

And plaintiff further says, that unless the said defendants are restrained therefrom by the injunction of this honorable court, they, the said defendants, will continue against equity and good conscience, to trespass upon, extract, mine, and carry away, the ores and valuable minerals contained in, and belonging to, the said "South Star and Titus Mine," the property of the plaintiff.

Wherefore the plaintiff demands judgment:

1st. That an order issue, requiring the defendants at a time and place therein named, to show cause why a temporary injunction should not issue, requiring the defendants, their agents, servants, and employees to refrain from taking, carrying away, or converting to their own use, any ore, rock in place, or mineral; and
8 from working any deposit, vein, lead, ledge, or lode thereof, bearing iron, lead, silver, gold, or other mineral, lying in, upon, or under the six hundred and ten feet of "The South Star and Titus Mine," described in the complaint.

2nd. That pending the said order to show cause, a restraining order issue requiring the defendants, their agents, servants, and employees, to refrain from said acts until further order.

3rd. That a survey of the workings and developments of, in, and upon the said six hundred and ten feet of the said mine, be ordered by the court.

4th. That such temporary injunction issue, requiring the defendants, their agents, servants, and employees, to refrain from said acts pending this action.

5th. That the plaintiff recover judgment against the defendants for one million dollars damages, and costs.

6th. That thereupon the injunction prayed for be made perpetual.

7th. And for such other, further, and general relief as the plaintiff may be entitled to.

JAMES B. McKEAN,
THOMAS MARSHALL, AND
C. H. MORGAN,
Plaintiff's Attorneys.

TERRITORY OF UTAH, } ss.
SALT LAKE COUNTY. }

Alexander Tarbet, being first duly sworn, says, that he is the plaintiff in the above-entitled action; that he has heard read the foregoing complaint, and knows the contents thereof; that the
9 same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

ALEX. TARBET.

Subscribed and sworn to before me, this 11th day of December, 1875. WM. H. BETTS, *Clerk.*
By WILLIS P. MCBRIDE, *Deputy Clerk.*

TERRITORY OF UTAH, } ss.
COUNTY OF SALT LAKE, }

Alexander Tarbet, being first duly sworn, says, that he is the plaintiff in the above-entitled action; that he has heard read the amendment to the complaint allowed by the court on the 20th day of December, instant, to be made herein, and knows the contents thereof, and that the same is true of his own knowledge.

ALEX. TARBET.

Subscribed and sworn to before me, this 21st day of December, 1875. W. H. BETTS, *Clerk.*
By WILLIS P. MCBRIDE, *Deputy Clerk.*

10 In the Third District Court of Utah Territory.

ALEXANDER TARBET, PLAINTIFF,
vs.
THE FLAGSTAFF SILVER MINING COMPANY OF Utah, (limited,) J. N. H. Patrick, Matthewson T. Patrick, Algernon S. Patrick, and George Cullens, Defendants. } Answer.

Now come the defendants, the Flagstaff Silver Mining Company of Utah, limited, and J. N. H. Patrick and George Cullins, on whom summons has been served in the above cause, and for answer to the complaint say:

That the said Flagstaff Silver Mining Company of Utah, limited, now is, and has been since the 14th day of December, 1871, seized in fee simple of the following described portion of the Flagstaff lode of quartz and other rock in place, bearing gold, silver, and other valuable minerals and deposits, and situate in Little Cottonwood Mining District, Salt Lake county, Utah Territory, to wit: of one thousand feet on each side of the Discovery shaft of the said Flagstaff lode, making in the aggregate two thousand linear feet of

said lode, and from which said Discovery shaft, United States mineral monument, No. 3, bears south 44° 35′ east, at a distance of 2,315 feet.

That ever since said Flagstaff Silver Mining Company of Utah, limited, became seized in fee simple, of said described portion of said Flagstaff lode, it has been in continuous possession, and entitled to the possession thereof, together with the right, under and by
11 virtue of the laws of Congress, and the United States patent, through which said Flagstaff Company derives title to said two thousand feet of the said Flagstaff lode, to follow said lode for the distance of two thousand linear feet, with its dips, angles, and variations to any depth, although it may enter the land adjoining.

That while said Flagstaff Company was so in the possession, and seized in fee simple of the said two thousand linear feet, of the said Flagstaff lode, it extracted therefrom, and appropriated to its own use, as it had a lawful right to do, a large amount of ore, and the ore so extracted from the Flagstaff lode, is the same for which plaintiff claims a recovery of damages in his complaint, and is the only ore ever taken by said Flagstaff Company from the premises claimed by plaintiff.

That the only portion of any lode, vein, or deposit of quartz or other rock in place, bearing gold, silver, or other valuable minerals or deposits, contained within, or running through, or in the direction of the premises so claimed by said plaintiff, is that part of the said Flagstaff lode, so as aforesaid owned and possessed by said Flagstaff Company, and that the said Flagstaff lode is well defined, and has a continuous and unbroken ore and vein continuation from the Discovery shaft into, through, and beyond the premises claimed by the plaintiff, and is the same lode as that set up in the complaint under the name of the South Star and Titus.

Said defendants further answering, deny that plaintiff now has, or has had, since the 16th day of September, 1871, any right, title, or interest whatever in the premises, or in the said two thousand feet of the Flagstaff lode, from which the ore referred to in the complaint, and for the alleged unlawful conversion of which he seeks a recovery against the defendants, was extracted.

12 That on said 16th day of September, 1871, the said plaintiff in conversation with Thomas Marshall and James M. Carter, who were grantors of the plaintiff for one-third of his interest in the Flagstaff lode, having asserted a claim to said Flagstaff lode, from which the ore referred to in said complaint was taken by the Flagstaff Company, and plaintiff having before then filed a protest in the United States Land Office, in Salt Lake City, against the issuing of a patent for said Flagstaff lode to the applicants therefor, the said Salt Lake Mining Company, a corporation, for and in consideration of the sum of thirty thousand dollars, in hand actually paid to the said plaintiff, and to the said Thomas Marshall and James M. Carter, they conveyed by deed, duly execu-

ted and acknowledged and delivered to the said Salt Lake Mining Co., the said Flagstaff lode, embracing the said two thousand feet of said lode, so as aforesaid possessed and owned in fee simple by the said Flagstaff Company, and from which the ore extracted and appropriated by said company was taken; a copy of said deed is hereto attached and made part hereof, marked Exhibit "1," and has been duly recorded in the recorder's office of Salt Lake county, Utah Territory.

That of the consideration so paid, the said plaintiff received twenty thousand dollars, upon the payment of which plaintiff withdrew his said protest and permitted the said Salt Lake Mining Company to enter and pay for the Flagstaff lode and mining premises, and obtain a patent therefor, which patent defendants will produce on the trial of this cause.

That afterwards said Salt Lake Mining Company, by deed, duly executed, delivered, and recorded, conveyed said two thousand feet of the Flagstaff lode and the appurtenances thereto belonging, to the Flagstaff Silver Mining Company of Utah, limited.

That said plaintiff since making said conveyance has not
13 acquired any other or further title in or to the said Flagstaff lode; and that by reason of the premises the said plaintiff is estopped from asserting any claim to the said Flagstaff lode, under the name of the South Star and Titus mine or lode, or otherwise.

Said defendants further answering, deny that said plaintiff now is or ever has been in actual or constructive possession, or entitled to the possession of the premises or any part thereof, from which the ore referred to in the complaint was extracted, or that the ore so extracted and carried away by the Flagstaff Company was worth the sum of one million dollars, but on the contrary, say, that the cost of erecting the suitable and necessary machinery and improvements for working said mine with the costs of mining the ores extracted, and the costs of developing said mine have fully consumed the proceeds of the ores, and that said ores are not worth any sum whatever.

In answer to the allegation of plaintiff, that until the second day of December, 1875, he did not know, and had no reliable information, that the defendants were trespassing upon the plaintiff's premises, said defendants say, that at that time, and a long time before that date, to wit, for over five years, said plaintiff knew and repeatedly declared that the South Star and Titus location was on the Flagstaff lode.

Said defendants further deny that the alleged location of the South Star and Titus lode or mining claim was ever duly or lawfully made, or in pursuance of or in compliance with the rules, regulations, or customs of mines in Little Cottonwood Mining District, or the laws of the United States, or that said lode or mining claim has ever been occupied or possessed by the plaintiff or his

alleged predecessors in interest, in accordance with the rules of the Little Cottonwood Mining District, or with the laws of the United States, or that the same has ever been possessed or occupied by any person whomsoever in accordance with the said customs and laws, except said Flagstaff Company and its predecessors in interest, under the location and patent of the said Flagstaff lode.

Said defendants further say, that except the interest of plaintiff in the said Flagstaff lode, conveyed as aforesaid to the Salt Lake Mining Company, said plaintiff never has had any right, title, or interest whatever in or to the premises referred to in his complaint as the South Star and Titus mine or lode, or any right to the possession of the same or any part thereof.

Said defendants further say, that after said plaintiff had sold and conveyed the said Flagstaff lode, which consisted of twenty-six hundred lienear feet along the course of the same to the said Salt Lake Mining Company, and received therefor the sum of twenty thousand dollars, and after the said Flagstaff Company had expended large sums of money in developing said mine, to wit, the sum of five hundred thousand dollars, the said plaintiff, against equity and good conscience, and while the Flagstaff Company was in actual possession and seized in fee simple of the aforesaid two thousand linear feet of the Flagstaff lode, on or about the first day of January, A. D. 1873, and at divers and sundry other days since that time, with force and arms, and against the will and consent of the said Flagstaff Silver Mining Company of Utah, limited, unlawfully and wrongfully entered into and upon the said Flagstaff lode, at or near the southeast end of the portion thereof, claimed by plaintiff under the name of the South Star and Titus lode. The portion of the Flagstaff lode so entered upon being described on the plat referred to in the complaint as number one, northerly from the alleged discovery, and with force and arms, and against the will and wish of the said Flagstaff Company, unlawfully and wrongfully extracted and carried away therefrom, and converted to his own use, large quantities of ore, the property of said Flagstaff Company, of the value of one hundred thousand dollars, and still continues so to extract, carry away therefrom, and convert to his own use, from thirty to forty tons of ore per day.

That the Flagstaff lode and mining claim is valuable only for the ore which it contains; that until the second day of December, A. D. 1875, said defendants did not positively know that said plaintiff was trespassing, as aforesaid, on the two thousand feet of the Flagstaff lode.

That the plaintiff is not able to respond in damages to the Flagstaff Company for injuries caused by reason of the taking and converting to plaintiff's use said ores; and said plaintiff is thereby committing irreparable waste and injury to said mine, and threatens, and will continue so to do, unless restrained by an order of this court.

Said defendants further say that the said J. N. H. Patrick is the agent of the Flagstaff Company, and has had the control of the workings of its said mine, in extracting ore since the 12th day of December, A. D. 1873, and that except as such agent, he has had nothing whatever to do in the premises, and that during his agency not over twenty thousand tons of ore has been extracted.

The said defendants say that the said George Cullens is one of the servants of said Flagstaff Company, and as such has been engaged since the first of December, 1873, in working said mine for said Flagstaff Company, but that except in the capacity aforesaid, and during the time aforesaid, said defendant has not worked or mined, nor been in possession of, nor had anything whatever to do with, or about the premises claimed by plaintiff.

Said defendants deny that plaintiff has been damaged in the sum of one million of dollars, or in any other sum whatever.

16 Said defendants, by reason of the premises, pray for judgment against the plaintiff, for the sum of one hundred thousand dollars damages, and also pray that a temporary injunction may issue by order of this court, enjoining and prohibiting said plantiff, his agents, servants, and employees, from the further commission of the acts complained, pending the trial of this action.

And that said plaintiff, his agents and employees, may likewise be enjoined from interfering with the Flagstaff Company, its agents and employees, in working said Flagstaff lode, pending this suit, and that on the final trial, a perpetual injunction may issue, enjoining and restraining said plaintiff, his agents and employees, from mining or extracting ore from said two thousand feet of the Flagstaff lode, and from entering upon, occupying, or in any manner interfering with the right of the Flagstaff Company to enjoy, possess, and mine the said two thousand feet of said Flagstaff lode; and for such other and further relief as equity may require.

BASKIN & DEWOLFE,
Attorneys for Defendants making this answer.

TERRITORY OF UTAH, } ss.
COUNTY OF SALT LAKE. }

J. N. H. Patrick, being duly sworn on his oath, says: I am one of the defendants in this action, and am agent and general manager of said Flagstaff Silver Mining Company of Utah (limited).

Said company is a foreign corporation; the principal officers of which reside abroad, and are not in this territory. I have heard read the foregoing answer and know the contents thereof, and the same is true of my own knowledge, except as to matters therein stated on information or belief, and as to those matters I believe them to be true.

J. N. H. PATRICK.

17 Subscribed and sworn to before me, this 24th day of December, A. D. 1875.

[SEAL.] SAMUEL E. MAY, *Notary Public.*

EXHIBIT "I."

This indenture, made the sixteenth day of September, in the year of our Lord one thousand eight hundred and seventy-one, between Alexander Tarbet, Thomas Marshall, and James M. Carter, all of the Territory of Utah, parties of the first part, and The Salt Lake Mining Company, a corporation under the laws of Utah Territory, the party of the second part—

Witnesseth, that the said party of the first part, for and in consideration of the sum of thirty thousand dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, released, and forever quit-claimed, and by these presents do grant, bargain, sell, remise, release, and forever quit-claim, unto the said party of the second part, and to its assigns and successors, all that certain lode, ledge, or deposit of mineral, known as the "*Flagstaff Lode*," consisting of twenty-six hundred feet, in lineal feet, in Little Cottonwood Mining District, in Little Cottonwood Canyon, in Salt Lake county, Utah Territory; together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz, rock, and earth therein, and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant, or therewith usually had and enjoyed, and also all and singular the tenements, hereditaments, and appurtenances thereto belonging, or in anywise appertaining, and the rents, issues, and profits thereof, and also all the estate,
18 right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity of the said party of the first part, of, in, or to the said premises, and every part and parcel thereof, with the appurtenances; to have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, its successors and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

ALEX. TARBET, [SEAL.]
THOMAS MARSHALL, [SEAL.]
JAMES M. CARTER. [SEAL.]

Signed, sealed, and delivered in the presence of—
A. S. GOULD,
C. A. GOULD.

This deed is duly stamped *A. T. et al.*, Sept. 16th, 1871.

United States of America.

TERRITORY OF UTAH, } ss.
COUNTY OF SALT LAKE. }

On this eighteenth day of September, A. D. one thousand eight hundred and seventy-one, personally appeared before me, A. S.

Gould, a notary public in and for the county of Salt Lake, Territory of Utah, Alexander Tarbet, James M. Carter, and Thomas Marshall, whose names are subscribed to the annexed instrument as parties thereto, personally known to me to be the same persons described in, and who executed the said annexed instrument, as parties thereto, and the said parties thereto duly acknowledged to me that they each, respectively, executed the same freely
19 and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal, at Salt Lake City, the day and year in the certificate first above written.

[SEAL.] A. S. GOULD, *Notary Public.*

Filed for record Oct. 5th, at 10.30 A. M., 1871.
Recorded Oct. 5th, 1871.

TERRITORY OF UTAH, } *ss.*
COUNTY OF SALT LAKE. }

I, Edwin D. Wooley, recorder in and for said county, do hereby certify that the foregoing is a full, true, and correct copy of the record in my office, of the deed from Alex. Tarbet *et al.* to Salt Lake Mining Company, as the same is recorded in Book C, folio 153, this 30th day of Sept., 1875.

[SEAL.] EDWIN D. WOOLEY,
County Recorder, Salt Lake County.

Endorsed: Copy served Dec. 25th, 1875. McKean & Marshall, attorneys for plaintiff. Filed Dec. 27th, 1875. Wm. H. Betts, clerk. By Willis P. McBride, deputy clerk.

Order to show cause, etc.

The plaintiff, by his attorney, having applied to the judge of this court, at chambers, for an order requiring the defendants herein to show cause why an injunction should not issue against them, and for an order restraining them in the meantime, according
20 to the prayer of the complaint herein; said motion having been made upon the complaint, the affidavits of the plaintiff, of William H. Munro, Douglas McNaughton, and John McDonell, on file herein.

Now, therefore, in open court it is ordered: That the said motion for a restraining order against the defendants herein be, and the same hereby is, overruled; that the motion for an injunction herein be heard on the said papers, in this court, at the federal court-house, in Salt Lake City, on Saturday, the 18th day of December, 1875, at 10 o'clock in the forenoon; that the defendants serve copies of such papers as they intend to read on such motion, on the plaintiff's attorneys, on or before 10 o'clock on the morning of Friday, the 17th day of December, inst.; and that the plaintiff this day serve on

the defendants, or on Mr. DeWolfe, who here appears in court as one of the attorneys of the defendants, copies of the said complaint and accompanying affidavits.

December 14th, 1875. ALEX. WHITE, *Judge, etc.*

TERRITORY OF UTAH, } ss.
COUNTY OF SALT LAKE. }

I hereby certify that I received the within order to appear and show cause why an injunction should not issue "on the 14th" day of December, A. D. 1875, and that on the same day I served the same upon the defendant, the Flagstaff Silver Mining Company of Utah (limited), by leaving a copy thereof with J. N. H. Patrick, its acknowledged agent and manager.

Dated December 18th, 1875. GEO. R. MAXWELL,
U. S. Marshal.

Fees, $2.50. A. PRATT,
Deputy U. S. Marshal.

21 Endorsed: Filed December 27th, 1875. Wm. H. Betts, clerk. By Willis P. McBride, deputy clerk.

At a District Court of the Third Judicial District of the Territory of Utah, county of Salt Lake, held at the court-house in the city and county of Salt Lake, on the 2d day of August, A. D. 1876.

Present, the Hon. M. Schaeffer, judge of the third judicial district.

ALEXANDER TARBET, PLAINTIFF,
vs.
FLAGSTAFF SILVER MINING COMPANY of Utah (limited), Defendant.

This cause coming on to be heard on the motion of the plaintiff for a temporary injunction herein against the defendant, now on this day, after argument by the attorneys, for the respective parties, and due consideration by the court, the said motion is overruled.

Order Substituting Helen Tarbet, as Plaintiff.

The motion herein to substitute Helen Tarbet as plaintiff, in place of Alex. Tarbet, having been heard, and it appearing that Helen Tarbet is the assignee of the cause of action, and the real party in interest, it is ordered that said motion be allowed, and that Helen Tarbet be substituted as plaintiff herein, and allowed to prosecute the action in her name, but that as such plaintiff, she be lia-
22 ble in case of judgment against her by the defendants, or either of them, for costs now incurred, in the case, as well as to accrue, and, also, without prejudice to the liability of Alex. Tarbet for costs already incurred.

Dated September 21st, 1877.

By the court. M. SCHAEFFER, *Judge.*

Endorsed: Filed September 21st, 1877. C. S. Hill, clerk. By H. G. McMillan, deputy clerk.

At a District Court of the Third Judicial District of the Territory of Utah, county of Salt Lake, held at the court-house, in the city and county of Salt Lake, on the 3d day of October, A. D. 1877.

Present, the Hon. M. Schaeffer, judge of the third judicial district.

HELEN TARBET, ASSIGNEE OF ALEXANDER Tarbet, Plaintiff,
vs.
FLAGSTAFF SILVER MINING COMPANY OF Utah (limited), et al., Defendant.

At this time this cause came on regularly for trial; leave is given defendant to amend answer, and the case is dismissed as to all the defendants except the Flagstaff Silver Mining Company.

23 The attorneys for the respective parties were present, Bennett & Harkness for the plaintiff, and Robertson & McBride for the defendant. A jury of twelve persons is duly empaneled, and sworn to try said cause, to wit: John Whitney, O. P. Bates, C. E. Wallin, Geo. B. Bailey, Dominic Dignan, Geo. Speirs, Geo. W. Price, John P. Smith, Chas. Layton, Adam Sandberg, Sanford Bingham, Henry Tucket.

Helen Tarbet, Alex. Tarbet, Thos. Marshall, and O. A. Palmer, were sworn and examined as witnesses, for the plaintiff, and the further hearing of this cause is continued until to-morrow.

At a District Court of the Third Judicial District of the Territory of Utah, county of Salt Lake, held at the court-house, in the city and county of Salt Lake, on the 4th day of October, A. D. 1877.

Present, the Hon. M. Schaeffer, judge of the third judicial district.

HELEN TARBET, ASSIGNEE OF ALEX. Tarbet, Plaintiff,
vs.
FLAGSTAFF SILVER MINING COMpany of Utah, (limited,) Defendant.

On this day the trial herein was resumed. Geo. Cullins, D. P. Jones, H. C. Callahan, A. Hanover, and Louis Martin, were sworn and examined as witnesses on the part of the plaintiff, and evidence on the part of the plaintiff closed. Now at the close of the evidence, on the part of the plaintiff, the said defendant moves

24 the court for a judgment of non-suit, on the ground that the plaintiff has failed to prove a sufficient case for the jury in the following particulars: 1st. Plaintiff has failed to show that

she or her assignor or predecessor, was in the actual possession of the grounds or premises when the trespass was alleged to have been committed at the time of the alleged trespass. 2d. Plaintiff has failed to show an exclusive possession of such premises at the time aforesaid. 3d. The evidence on the part of the plaintiff shows that the defendant, during all the time aforesaid, was in actual possession of the premises, and of that portion from which the defendant extracted or removed any ores, and that such possession was accompanied by a claim of title to the said premises, from which its employees removed ore; and 4th, it is alleged in the complaint, and stands admitted by the pleadings, that the defendants extracted ores for the conversion of which damages are sought to be recovered in this suit, under a claim or color of title to the lode or premises adverse to the plaintiff. 5th. The plaintiff has shown no cause of action, because it appears that the plaintiff is only one of several tenants in common, against whom the alleged trespass was committed, and the suit can only be maintained for all; and the said motion having been fully argued by the attorneys for the respective parties, and the court being in all things fully advised, it is ordered that said motion be, and the same is hereby overruled, to which ruling the defendant, by its attorneys, then and there duly excepted.

At a District Court of the Third Judicial District of the Territory of Utah, county of Salt Lake, held at the court-house, in the city and county of Salt Lake, on the 5th day of October, A. D. 1877.

Present, the Hon. M. Schaeffer, judge of the third judicial district.

HELEN TARBET, ASSIGNEE OF ALEX. TARBET, PLAINTIFF,
vs.
FLAGSTAFF SILVER MINING COMPANY, OF UTAH, (LIMITED,) DEFENDANT.

On this day the jury trial herein was resumed. Moses Hirschman, William Groesbeck, and John Groesbeck were sworn and examined as witnesses, on the part of the defendant, and the plaintiff offered in evidence a deed; objected to by defendant, and the court sustained the objection; and the evidence is closed. Robert Harkness opened the argument on the part of the plaintiff, followed by J. N. Baskin, for the defendant; and the further hearing is continued until to-morrow.

At a District Court of the Third Judicial District of the Territory of Utah, county of Salt Lake, held at the court-house, in the city and county of Salt Lake, on the 6th day of October, A. D. 1877.

Present, the Hon. M. Schaeffer, judge of the third judicial district.

26 HELEN TARBET, ASSIGNEE OF ALEX. TARBET,
Plaintiff,
vs.
FLAGSTAFF SILVER MINING COMPANY, OF UTAH,
(limited,) Defendant.

On this day the jury trial herein was resumed, and the roll of jurors being called, all answered to their names. The argument was resumed by J. R. McBride, for the defendant, and C. W. Bennett, for the plaintiff; and the argument is closed. The court then instructed the jury, and they retire in charge of a sworn officer of this court, to wit, Wm. Nelson the U. S. marshal, and afterward the said jury returned into open court, and being called, each juror says the following is his verdict, to wit: "We, the jury, wherein Helen Tarbet is plaintiff, and the Flagstaff Mining Company are defendants, find for the plaintiff and assess the damages at $45,000: 1, C. E. Wallin, foreman; 2, John K. Whitney; 3, Adam Sandberg; 4, G. W. Price; 5, Geo. Spiers; 6, John P. Smith; 7, Sandford Bingham; 8, Henry Tucket; 9, Charles Layton; 10, O. P. Bates; 11, Geo. B. Bailey; 12, Dominick Dignan."

Salt Lake City, October 6th, 1877.

Which verdict was filed in open court, in the presence of said jurors.

Wherefore, it is ordered and adjudged by the court, that judgment be entered herein against the defendant, the Flagstaff Silver Mining Company of Utah (limited), and in favor of the plaintiff, Helen Tarbet, in accordance with said verdict, for the sum of forty-five thousand dollars ($45,000), together with plaintiff's
27 costs and disbursements, on this behalf, incurred and taxed at $169,70, which judgment is entered in judgment Book "D" folio.

Verdict.

We, the jury, in the case wherein Helen Tarbet is plaintiff, and the Flagstaff Mining Company are defendants, find for the plaintiff, and assess the damages at $45,000.

1. C. E. WALLIN, *Foreman.*
2. JOHN K. WHITNEY.
3. ADAM SANDBERG.
4. G. W. PRICE.
5. GEO. SPIERS.
6. JOHN P. SMITH.
7. SANDFORD BINGHAM.
8. HENRY TUCKET.
9. CHARLES LAYTON.
10. O. P. BATES.
11. GEO. B. BAILEY.
12. DOMINICK DIGNAN.

Salt Lake City, October 6th, 1877.

Endorsed: Filed October 6th, 1877. C. S. Hill, clerk.

28 In the District Court of the Third Judicial District of the Territory of Utah, in and for the county of Salt Lake.

HELEN TARBET, ASSIGNEE OF ALEXANDER Tarbet, Plaintiff,
vs.
THE FLAGSTAFF SILVER MINING COMPANY, of Utah, (limited,) Defendant.
} Judgment on verdict.

This action came on regularly for trial. The said parties appeared by their attorneys. A jury of twelve (12) persons was regularly empaneled and sworn to try said action. Witnesses on the part of plaintiff—and defendant—were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and being called, answered to their names, and say they find a verdict for the plaintiff as follows, to wit: We, the jury, in the case wherein Helen Tarbet is plaintiff, and the Flagstaff Mining Company are defendants, find for the plaintiff, and assess the damages at forty-five thousand dollars: 1, C. E. Wallin, foreman; 2, John K. Whitney; 3, Adam Sandberg; 4, G. W. Price; 5, Geo. Spiers; 6, John P. Smith; 7, Sandford Bingham; 8, Henry Tucket; 9, Charles Layton; 10, O. P. Bates; 11, Geo. B. Bailey; 12, Dominick Dignan.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said plaintiff have and recover from said defendant the sum of forty-five thousand dollars ($45,000), with interest thereon at the rate of 10 per
29 cent. per annum, from the date hereof till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of one hundred and sixty-nine dollars and seventy cents ($169.70).

Judgment rendered October 6th, A. D. 1877.

At a District Court of the Third Judicial District of the Territory of Utah, County of Salt Lake, held at the court-house, in the city and county of Salt Lake, on the 7th day of October, A. D. 1877.

Present, the Hon. M. Schaeffer, judge of the third judicial district.

HELEN TARBET, ASSIGNEE OF ALEX. TARBET, Plaintiff,
vs.
THE FLAGSTAFF SILVER MINING COMPANY OF Utah (limited), Defendant.

Now, on this day comes on to be heard plaintiff's motion for a perpetual injunction, to be included in the judgment herein, and the court being fully advised, it is ordered that said motion be, and the

same is hereby, overruled and denied—to which ruling plaintiff, by her attorneys, did then and there except; and it is further ordered the defendant have sixty days to prepare its notice of intention and motion, and statement for new trial, and that in the meantime all proceedings and the judgment herein be, and the same is hereby, stayed.

30 *Motion for New Trial.*

Now comes the Flagstaff S. M. Co. of Utah (limited), defendant, and by its attorneys moves the court for a new trial herein on the following grounds, viz:

1st. Insufficiency of the evidence to justify the verdict of the jury, and that the verdict is against law.

2d. Errors of law accruing at the trial, and excepted to by the defendant, as set forth in the statement, and in the notice herein filed, of intention to move for new trial, and in the assignment of errors by said plaintiff in said statement, and the defendant will rely at the hearing upon the pleadings, statement, exceptions, and exhibits in the record to sustain this motion.

ROBERTSON & McBRIDE,
Defendant's Attorneys.

SALT LAKE CITY, *December 6th*, 1877.

Endorsed: Filed December 6th, 1877. C. S. Hill, clerk. By B. P. Hill, deputy clerk.

Order denying Motion for New Trial.

Now, on this day came on the motion of the defendant for a new trial, on the pleadings, statement, exhibits, and record herein, the parties being present by their counsel, C. W. Bennett for plaintiff, and John R. McBride for defendant, and the motion having been heard, submitted, and considered by the court, it is ordered and adjudged that said motion be overruled, on the following grounds and reasons:

The court finds that the evidence is sufficient to sustain the verdict of the jury, and that the same is in accordance with law.

31 2d. That there were no errors in law as alleged in the exceptions taken at the trial, and that the rulings excepted to by defendant were in accordance with law.

To which ruling and decision of the court the defendant there and then excepted as error, and the exception is allowed, and is truly made of record.

M. SCHAEFFER, *Judge.*

Filed December 8th, 1877.

C. S. HILL, *Clerk.*

By H. G. McMILLAN, *Deputy Clerk.*

HELEN TARBET, PLAINTIFF, vs. FLAGSTAFF S. M. CO. ET AL., DEFENDANT, } District Court, 3rd Judicial District of Utah Territory.

Statement on Motion for New Trial.

This is an action to recover of defendants one million dollars, as damages for the wrongful and unlawful extraction, taking, and carrying away ores from mining ground claimed by the plaintiff, and to restrain and enjoin the defendants from further trespasses on the plaintiff's alleged mining claim.

The action was commenced in the name of Alexander Tarbet, December 13th, 1875, and it appearing that before the trial he assigned the subject-matter of the action to Helen Tarbet, she was substituted as plaintiff, by order of the court, made August 3rd, 1877.

32 The cause being regularly called for trial on the third day of October, 1877, was tried by a jury before the court.

During the progress of empaneling the jury, one Nicholas Trewick was called as a juror and examined as to his competency to sit.

It being agreed that one of the principal questions involved in the trial of the issues was whether a party having a patent to mining ground, under the act of Congress of July, 1866, could follow the lode patented in its course outside of the side lines of the patent, as against the claim of an older location, who was without patent, said Trewick having answered the defendant's counsel that he was a miner, was then asked the following questions, and gave the following answers:

Question. Are you interested in any controversy in which the question is involved as to the right of a party to go outside of his surface lines of a mining claim? Not that I am aware of.

Q. Have you any opinion on that question? Every miner has an opinion in regard to it.

Q. Have you an opinion? I have no direct opinion.

Q. I asked you if you had an opinion on that question, whether a party has a right to follow his vein outside of his patented lines? I believe I have an opinion on that question.

Q. (By the court.) Do you suppose you could have the evidence and the instructions of the court, touching the question of the right of parties to go outside of their patented lines, and then find a verdict according to the law and the evidence as it would be given to you? Yes, sir.

The defendant challenged the juror as incompetent; incompetent on the ground of bias. The court overruled the chal-
33 lenge, to which ruling the defendant excepted, and the exception allowed, and the ruling is assigned as error.

The defendant afterwards challenged the juror peremptorily, and he did not sit on the trial of the case.

The jury was then impaneled and sworn, and tried the cause.

The plaintiffs offered in evidence a certified copy of the notice of location of the South Star and Titus mining claim, recorded in the district records, October 1st, 1867, marked Exhibit "A," and read to the jury.—(See Exhibit "A," appended.)

The plaintiff at the trial offered in evidence the local laws and miners' regulations of Mountain Lake Mining District, being the laws under which the mining ground on which the alleged trespass was committed was located.

The defendant objected that the plaintiff had not pleaded said laws as a basis of title, and that they being local laws, should be pleaded before they could be admitted in evidence.

The court overruled the objection and admitted the evidence, to which ruling the defendant excepted, and the exception was allowed, and is here assigned in error.

The laws of Little Cottonwood Mining District, being the district in which the said plaintiff's mining claim is now situate, was then offered in evidence by the plaintiff, and the same objection as the last was made by defendant to their admission, with a like ruling and exception by defendant, which was allowed, and said ruling is here assigned as error.

The plaintiff offered in evidence a notice of re-location of Nos. 2 and 3 of the Titus lode, as follows:

34 TITUS LODE.

Re-location.

We, the undersigned, do hereby re-locate the following claims upon the Titus lode: Claim No. 2, 200 feet, Alexander Tarbet; claim No. 3, 200 feet, Henry Lee. The above claims being on the Titus lode, running a northwest and a southeasterly direction from the discovery claim of the Titus lode. Said claims being vacant and abandoned under the mining laws of Little Cottonwood District and subject to re-location.

ALEXANDER TARBET, No. 2.
HENRY LEE, No. 3.

Filed for record, January 18th, 1872, at 3.21 P. M., request of Henry Lee.

RECORDER'S OFFICE, LITTLE COTTONWOOD MINING DISTRICT, UTAH TERRITORY,
January 18th, 1872.

I, John McDonald, recorder of Little Cottonwood Mining District, do hereby certify the above to be a true copy of the re-location upon the Titus lode, recorded in Book "B," of locations, page "156," of the records of this mining district.

JOHN McDONALD, *Recorder.*

The defendant objected to its admission in evidence, on the following grounds:

1st. Because the notice of location does not comply with article 14, of the amendments to the laws of the district of June 2d, 1870, which reads as follows:

"He (the district recorder) shall record all claims presented for that purpose, and be entitled to receive therefor one ($1.00)
35 dollar for each separate claim or company. *Provided*, that it shall not be lawful for him to record any claim in conflict with a prior location * * * * before recording any claim, he shall satisfy himself that no rights are infringed."

2d. Because it does not appear that the ground was subject to re-location, under article 10 of the Mountain Lake District Laws, or article 14 of the same laws, which were in force. Said article 10 is as follows:

"Whenever $300 shall have been expended upon the claims of any company in this district, the ground so claimed by said company shall be deemed as belonging in fee to the owners and their assigns, and the same shall not be subject to re-location by other parties ever after, except by an acknowledged abandonment of the ground by the company, which shall be so construed after the ground shall have laid idle for one year, and except in cases where the claims are in litigation." Said article 14 of the laws of June 2d, 1870, is as follows:

"In making a record of location of any claim, there shall be definitely described with reference to some natural or artificial monument."

3d. The notice is void for uncertainty; the description is inconsistent with itself, because it is described as running in both directions given—northwest and southwest.

Plaintiff's counsel stated that the plaintiff expected to show that the ground was subject to re-location. Subject to that proof, the notice was admitted, to which ruling by the court the defendant excepted, and the exception was allowed, and the same is now here assigned in error.

Plaintiff then offered a certified copy of deed from Titus Axen to Alexander Tarbet, of No 1, Titus lode, dated
36 The defendant objected to its admission (waiving proof of loss of the original deed) on the ground—

That it appears from the evidence of plaintiff that these claims were located by a number of persons by name, and in their conveyance, No. 1 is treated as segregated ground—whenever it was located by a company, and Titus Axen only owned an undivided seventh interest in it—instead of the whole two hundred feet.

The objection was overruled, and the evidence admitted.

The deed purported to convey to Alexander Tarbet two hundred feet, being claim No. 1, Titus lode, was duly made and executed by Titus Axen.

The defendant excepted to the ruling of the court, and the exception was allowed and is assigned here as error.

The plaintiff then offered in evidence conveyances from Alexander Tarbet to Ivins, which was received and marked Exhibit "F;" also conveyance from Alexander Tarbet to Anthony and Israel Ivins, marked Exhibit "G;" conveyance from Anthony Ivins and others to Alexander Tarbet, marked Exhibit "H;" conveyance from Henry Lee to Alexander Tarbet, marked Exhibit "I;" conveyance from Alexander Tarbet to Henry Lee, marked Exhibit "J; conveyance from Alexander Tarbet to Henry Lee, marked Exhibit "K."

Plaintiff offered in evidence assignment of Alexander Tarbet to Helen Tarbet of the cause of action set forth in the complaint, and without objection marked Exhibit "L."

EXHIBIT "L."

For value received, I, Alexander Tarbet, of Salt Lake City, Utah, hereby sell, assign, and transfer to Helen Tarbet, of the same place, all my claims and demands against the Flagstaff Silver Mining Company of Utah, (limited,) Erwin Davis, J. N. H. Patrick, and any and all other persons and parties, for damages for mining and extracting ore from the South Star and Titus mine, in Little Cottonwood Mining District, Salt Lake county, Utah, prior to the 5th day of June, 1876; also certain causes of action as set forth in a complaint in an action pending in the District Court for the Third Judicial District of Utah, in which I am plaintiff, and the said Flagstaff Company, and other defendants, which complaint was filed December 13, 1875, and a summons issued thereon December 14, 1875, said causes of action being for damages for entering and extracting ores from said mine for three years prior to said action, and for an injunction and other relief; and I authorize the said Helen Tarbet to prosecute said action, in my name or otherwise, and to collect and receive, for her own benefit, all damages therein claimed and recoverable, and to obtain such other and further relief as may be proper and obtainable in said action.

37

Dated July 31, 1877. ALEX. TARBET.

Witness: ROBT. HARKNESS.

The defendant objected to Exhibits F, G, H, I, J, and K, on the ground that they were immaterial and irrelevant.

The court overruled the objection, and the defendant excepted to the ruling, and the exception was allowed and is assigned as error.

The plaintiff then intoduced Alexander Tarbet as a witness, and was duly sworn and testified on the question involved in this appeal, as follows:

I am acquainted with the South Star and Titus mine; commenced to work on it in the summer of 1868; I bought from Titus

Axen early in the spring of 1868; I know claims Nos. 2 and
38 3 of Titus; I never knew of any work done on them, except what I done myself in 1868–'9 and '70; all the work that has been done on that has been done by myself; no work was done on those two claims prior to 1872, except what I done; my work was done on No. 1; I re-located Nos. 2 and 3—I think it was in 1872—snow was on the ground at the time—must have been late; there had never been any work done on them prior to the re-location; should have known it if there had been, as I was right there on the ground; no work had been done within a year, and I located because no work had been done on it. The re-locations were made in Henry Lee's name and mine; Lee in No. 3, and No. 2 in my name, I think. After the location, three claims, Nos. 1, 2, and 3 were worked in company. By "Company," I mean Lee and myself and Marshall and Carter consolidated their claims together, and worked in company.

I was in possession of the ground from the time of the re-location, until the receiver of the South Star and Titus mine was appointed by the court, in the suit of Lee and Ottenheimer vs. Tarbet, (myself,) in June, 1876; I have been in possession since 1868; consider that I was still in possession, as I consider the receiver was illegally appointed.

Q. You say this work was done in consolidation between you and Lee and Marshall and Carter. State when it was done and how. We had run the shafts down what we called the South Star shaft, and the Titus shaft, and the Discovery shaft; we run that down about 140 feet, and at the foot run the two together. Afterwards run a tunnel in about 400 feet, and other tunnels to connect; and other drifts several hundred feet afterwards. The main tunnel was run to connect with those two shafts and the old workings, so as to take out ore cheaper. It was done for the purpose of work-
39 ing these three claims. I superintended the work myself, I may say up to the present time, with the exception of the time the receiver had the mine. The work was done for the owners of three claims, and Marshall and Carter paid part, and Lee and I paid part of the cost.

The mine has been opened extensively, and I consider it the leading mine in the territory; could not tell the number of feet of workings; over a thousand feet I know, I opened up myself; taking drifts, tunnels, and other works.

The most of it has been done since the re-location. The two shafts were partly done, but the main tunnel has all been run since. I think that all the workings done since the re-location to December, 1875, could not be done for less than thirty to forty thousand dollars. The receiver was not in possession till June, 1876, and no one was in possession except myself, co-owners, till this suit was brought, except I was absent in the states at one time, and appointed Marshall and Carter agents, to attend to the mine while I

was gone—about three months—and they were interested. I believe I was laid up sick in December, 1875; I was manager at that time—when Flagstaff broke into us—I had got over my sickness at the time; I had ordered my men to make connection, and they telegraphed that they had done so, and I went up and saw it. My orders to Hirschman the year previous, was to trace the Flagstaff out. In December, 1875, he did it; after Hirschman was discharged.

Q. How was Titus claim No. 1, 2, 3, 4, 5, 6, and 7 held, prior to the time of the re-location as company, on segregated ground? There never was any work done on any of the claims, except on the Discovery one—what I done myself. I am not aware of any work being done, only what I done, and that was on No. 1. They had not been consolidated prior to 1872, and could not have
40 been without my knowledge, as I had the Discovery from 1868, and would have known if any work had been done.

Cross-examination: Commenced work there in 1868, and developed that mine from the surface; I went into possession under the deed from Axen at that time. None of the owners worked with me; no one but my hired man. There was not work enough done when I went there to hold one claim; a little scratching had been done at the point called now the Discovery shaft; none of the locators worked with me in that shaft; I had the work done, paid for it, and assisted in doing it.

Q. What did you want the 10 feet of the South Star for? That was my business. The object was, I sold a part to Anthony and Israel Ivins; they owned part of that claim. I sold part of my interest. The two Ivins owned other claims in the South Star end, and I think I gave them $20 for this ten feet. If I saw fit to buy this ten feet, is that your business?

Q. Why was it you wanted that 10 feet? Because I wanted to buy it.

Q. Had you any other purpose than to get this ten feet of ground then? Not to my knowledge at the time.

Q. Was it not to get possession of that shaft? There was no shaft—only a little scratching on top of the ground.

Q. Did you buy it for the purpose of getting possession of the Discovery point, on the South Star and Titus? No, sir; I will explain how it came about. The Ivins wanted their ground from the South Star and Titus, and as they had other claims there, and offered if I would transfer my part of the ground in the South Star and Titus side, that they would transfer their ground on the northwest side of Discovery to me, and if I would give them $20, they would give me on the southeast side of the Discovery; they
41 wanted to get their ground all together in one piece in the South Star side, and made me the proposition that if I would deed my interest in the South Star side, they would deed their interest in the Titus side, and give me 10 feet of South Star,

if I would give them $20. That was bringing my ground altogether on the Titus side, and Anthony's altogether on the South Star side, and I got their ten feet by making the exchange and paying $20; at the time I owned 100 feet in the South Star. I originally bought 100 feet in the South Star and Titus; No. 1, on South Star, and No. 1, on Titus, two hundred feet each, making 400 feet in all. I sold 100 feet of each claim to the Ivins, and afterwards the exchange took place, and I got the ten feet by buying it for $20.

The Titus location was at the discovery in a little stake, right on the discovery. The work done there could have been done for $25, I think; some men might have valued it more; I think it could have been done for $10; when I bought from Axen all the work done could have been done in ten days; all done right at discovery stake.

No work was ever done to my knowledge on Nos. 2 and 3 till January 18, 1872; I was there all the time and would have known it had there been any.

The Flagstaff location is about 550 feet from the South Star and Titus discovery; work was done there in 1869 and '70—before the re-location of Nos. 2 and 3; work was going on at the Flagstaff when I re-located this claim.

They were working the Flagstaff right along I suppose; were taking ore out of the shafts at Flagstaff discovery; no work was being done between the Flagstaff and the South Star and Titus, that I knew of, and the ground between was not occupied for any purpose.

42 Q. Did you survey off the ground of Nos. 2 and 3 at the time of re-location? At the time we re-located the snow was on the ground, but the ground had been surveyed several times before and since.

Q. Did you make any survey or stick any stakes where you made the re-location? I had made a survey both before and after.

Q. Did you do it then? We could not do it then because the snow was on the ground. We ran over the ground—I know where all the stakes stood—knew every foot of the ground. I knew were the Flagstaff patent lines were; we ran the re-location over the patent ground, because I considered that the Flagstaff mine ran north and south, and they had a right of way through the South Star and Titus; I was aware there was 550 feet between the two discoveries, and that would take the Titus vein 50 feet the other side of Flagstaff discovery, when the Flagstaff crossed it at right angles.

Q. At the time of re-location, did you fix any marks on boards on the ground? Yes; I knew where all the stakes stood.

Q. Did you fix any marks or bounds on the ground? Yes; I told you I knew were those stakes were.

Q. That is not the question. Did you fix any marks or bounds on the ground? Yes, certainly; I knew where all the stakes were.

Q. Did you go around the boundaries of these two claims? Why, certainly.

Q. Did you set any stakes in that day? Yes, certainly; there were stakes set before—the stakes were there before—not then—snow was on the ground; parties were then at work in the Flagstaff; the southwest line of the re-location must be down the hill from the Flagstaff discovery shaft. The Flagstaff shaft must be inside the claim No. 3, of Titus; intended to take the Flag-
43 staff shaft if it came inside of claims Nos. 2 and 3 of the Titus. The Titus was the oldest claim, and had the right to take it in. The Flagstaff people had been at work about three years before the re-location was made; had taken out ore—considerable, I guess; I could not tell the course of the Flagstaff underground works at that time—they would not allow me in; I have heard different stories, and was informed so many different ways I could place no reliance on it; I had been informed that their works ran in all directions.

Q. Had you been informed that the Flagstaff workings ran in the direction of the South Star and Titus? No; I always understood they were working north and south, but I heard so many rumors that I could not place any confidence in anything; I understood they were working north and south on the Flagstaff vein; I would not believe that they were working towards me on surmises; I would have to know something positive.

Q. How comes it that you told Hirschman to trace them out? That was my orders, to trace them out and find if they were on our ground; that was the reason we traced them out and found them out; I heard lots of rumors, and I was tracing them out in order to prove it.

Q. You say you directed Hirschman to trace out the Flagstaff? I told him to run northwest and find out whether they were on our ground or not.

Q. Didn't you tell him not to run in that direction—that you didn't want any controversy with the Flagstaff? I told him to run northwest, but in place of that, he run outside into country rock; my positive orders were to run northwest, and if the Flagstaff was on our ground, to trace them out. I did not, in the winter of 1874 and 1875, tell Hirschman not to come in contact with the Fagstaff, and did tell him to trace them out, if they were on our
44 ground. I did not object to Hirschman running in the direction of Flagstaff, though I would not be surprised if you could get him to say anything. I did not have the mine surveyed to find out where we traced the Flagstaff out, whether we were on No. 1, No. 2, or No. 3.

Q. Whereabouts in No. 2 (Titus) did you ever do any work; have you ever done any work on No. 2? Do you mean on the surface or underground?

Q. On the surface or underground? We have ever since it has been re-located been doing work on the South Star and Titus mine. At the time we made the connection and traced the Flagstaff out,

as I understand from the survey, it was on No. 2; that was done in December, 1875.

Q. How much work was done on No. 2? When we traced them out, it was on No. 2; I could not tell where we first entered on No. 2, but when we traced them out, according to the survey, it was on No. 2.

Q. Did you ever do any work on No. 3? The Flagstaff did not allow us to go so far; they held us out by force; didn't allow us to get so far in; all the work was done from the discovery claim, and no work was ever done on the surface of No. 2 or No. 3 after the re-location; have made holes all over it before; have gone over that and prospected it for several years; done work over them; not assessment work, but prospecting for myself.

Q. That which you call work was done through the discovery at No. 1 and on into the other? Yes; we have run through No. 1; when we connected with the Flagstaff in No. 2, and they built a bulkhead and prevented us from going any further in our ground, we broke into their works, and they built a bulkhead and prevented us from going further; never had any other work on No. 2 and 3 after the re-location, except what was done through the Discovery shaft.

45 Q. You don't know whether any work was ever done on No. 2? Only from the survey; the survey shows it; I would not begin to correct the surveyor; no work was ever done on the surface of No. 2 or 3, after the re-location. We consolidated the claims, the same as all other owners did; it was done through the counsel of Marshall and Carter; we agreed to work the three claims in company, and did it.

Q. Where was the work done? Done on the South Star and Titus mine; it was done on No. 1 or No. 2; wherever we found ore; the survey will show where it was done. I worked for the benefit of myself and my co-owners, Lee and Ottenheimer, in 1875; they did not work with me after the court put it in my possession; after I ousted Lee and Ottenheimer, and you, (meaning McBride, the defendant's counsel,) the court put the mine in my possession, and I was working it for the benefit of all; after I gave $25,000 bonds; these bonds show that I was working it for the benefit of all.

Q. If you were working it for all the owners, why did you not bring this suit for all? Because you (McBride) counseled them not to have anything to do with it. From January, 1873, until December, 1875, I directed all the work in the mine, except for two or three months, when I was absent in the states in 1873. The consolidation took place by our agreeing to work it in company, after we re-located in 1872; that was between Marshall and Carter, Lee and myself.

Q. Don't you know that no part of the work done by Marshall and Carter, Lee and yourself, was on No. 2? I could not swear whether they did any work on No. 1 or No. 2.

Q. Don't you know that the work done by Marshall and Carter is charged to have been done on the South Star? I don't know any such thing; the time I refer to, when I left, they were
46 at work on the Titus shaft; they would have to run 200 feet to the northwest to get on No. 2; I had done work which I believe is on No. 2, when Hirschman took possession (in fall of 1874); I couldn't tell whether Hirschman did any work on No. 2; the survey would show.

Q. Don't you know that Hirschman's work was said to have been done on the South Star side of the line? No, sir; none of it, or if it was, it was against my orders; all my work was done on the northwest side of the shaft, and if Hirschman went southeast it was against my orders. I cannot give any value of the work done on No. 2.

Q. Can you swear that a lick of work was ever done on No. 2 by you? Oh, yes! According to the survey, where we traced the Flagstaff out, it was on No. 2. That point was the extreme northwest work on that level; I could not tell whether we run further northwest in other drifts and levels; I don't know where the line between No. 1 and 2 is unless I saw the survey and had it measured; I judge of it merely from the surveys; have not measured it myself. I had an interest in the Flagstaff location, No. 5, running south; I sold it to the Salt Lake Mining Company and made a deed to it.

Q. It was a deed for your interest in the Flagstaff lode, was it not? Yes; I was cheated out of that by the Salt Lake Mining Company. I received $20,000 and Marshall and Carter $10,000; the company paid $30,000 for the deed.

Q. Did you not deed your interest in the Flagstaff location and lode? Yes, certainly; the Salt Lake Mining Company was claiming the Flagstaff location and ground when I re-located No. 2 and 3, and was working on it, and claiming the ground, when I made the deed; I could not swear who was in possession at the time of the deed; it was being worked continuously, I believe; I
47 brought this suit a few days after we traced the Flagstaff out—just as soon as we found out they were really on our ground. When we broke in we found the Flagstaff employees were in possession and working on the vein; there was ore where we were at work, and ore where they were at work; ore on both sides; I have never been in possession of the ground where they were at work at that time. Never have been—no, sir. Never had any improvements off of No. 1, on the surface; never had been in possession of the surface, except in the workings of No. 1.

Q. You never have been in actual possession of any portion of that mine, except No. 1? I say, when we broke through, we were in No. 2.

Q. Have you ever been in possession of any part of the mine, northwest of the point where you broke in—up to the Flagstaff discovery? No; they built a bulkhead and would not allow us.

Q. They have always been in possession, ever since you sold to them, haven't they? Yes; I don't know whether we have ever been northwest of the point where we broke in, or not, don't know whether any of our other drifts are further northwest, or not; don't think there is much difference between this, and other drifts, we made connections in several places.

Q. Beyond the drifts that existed, when you broke in, you never have been in possession of any of the ground up towards the Flagstaff? Just as soon as we would work in, they would build a bulkhead and keep us from going any further on our ground.

Q. Is it not a fact, that at the institution of this suit, you never had been in possession of any of the ground northwest of your workings, at that time? At that point we was not.

Q. Were you ever in possession of any of the Flagstaff workings? Never beyond their bulkhead. I could not tell that the Flagstaff ever took any ore out of the workings of the South Star and Titus.

48 Thomas Marshall was then called, sworn and examined as a witness, by the plaintiff, and all of his testimoney, material to the issues on the appeal, was as follows:

I was formerly interested as an owner, in the South Star and Titus mine; at first in No. 1, shortly after in Nos. 2 and 3, of Titus; I know from an examination of title papers, that Nos. 2 and 3, were re-locations; I think (after looking at the notice), the re-locations were made in 1872, after the re-location, Nos. 1, 2, and 3, was held in common, with 10 feet of South Star, making 610 feet in all, after the re-locations, Mr. Lee, Tarbet, Carter and myself—Carter and myself owning one-eighth, Lee one-eighth, and Tarbet six-eighths—worked the mine together.

There was a conveyance or agreement by which we became tenants in common; there was a conveyance to Marshall and Carter, of one eighth in No. 1, before the re-locations of Nos. 2 and 3, and after that we made conveyance to each other, so that we all owned in the same proportion in the whole ground.

After this arrangement was made, work was done through the main shaft, I understand; don't know from personal knowledge, and by levels and drifts, but I don't know how far they run north. In the fall of 1872, or spring of 1873, we sold to Woodman; the deeds will show. The work was carried on their way, considerably at my expense, we contributed ratably, and I presume the others did, I knew we paid ourselves; I can't estimate the value of work done; we paid about $2,000, probably, work done was worth fifteen or sixteen thousand dollars. The consolidation of the ground took place, by deeding backwards and forwards.

Q, And the work following it in company? Yes, sir; I don't know where the work was done.

49 Cross-examination.—I don't know how much work was done; I only know the money was paid; about $2,000; I

remember assessments of a thousand dollars on ours alone. Don't know whether it was done on Nos. 1, 2, or 3.

O. A. Palmer was called, sworn, and examined by the plaintiff, and testified.

His testimony was mainly in explanation of the map, and is not material on any point taken in this matter, except the following:

The vein in the South Star and Titus discovery and in the Flagstaff, is the same lode; the general strike or course of it is about north 50°, west and south 50° each, and the dip about 45 to 47 degrees from a horizontal, and the course of the dip nearly northeast generally; varies a good deal at different points; that is about its general course, taking all the workings together. The Flagstaff patent crosses the course of the vein very nearly at right angles. The Titus ground, as shown in the survey and map, follows the line of outcrop, but not precisely the strike of the vein; they differ, owing to the conformation of the surface.

The map is marked Exhibit "L" "2," and was admitted in evidence and is made part of this statement. Claims No. 1, 2, and 3, of Titus, are laid down on the map in accordance with the statements of the owners or representatives of those three, as to where the ground is.

In December, 1875, when I made the survey for Mr. Tarbet, the Flagstaff was in possession of the ground northwest of the point of connection, and Tarbet of that to the southeast; Flagstaff was on one side and Tarbet's mine on the other; by possession, I mean whether his, Tarbet's men, were at work then or occupying the ground by himself or workmen; I do not know that any of Mr. Tarbet's works reached further to the northwest than the point at which the connection shown in the map is made.

George Cullens was then sworn on behalf of plaintiff, and all of his testimony that is material in this matter was as follows:

I was supt. of the Flagstaff mine and workings from December, 1873, till December, 1876, and am familiar with the mine and works, and know the mine called the South Star and Titus. During that time the Flagstaff workings extended to the southeast and to the northwest of the mine incline, as shown in the map.

The direction of the dip of the Fagstaff mine would be a little east of north; the main incline varied a little to the end from the true dip, it is very nearly in the corner of the dip, but bears to the east a little as it goes down.

The "Giest" shaft is nearly the true course of the dip of the vein. Tarbet was never in the mine while I was supt., or any part of its workings. Strangers were not admitted, except by my orders or Mr. Patrick's (the manager); I made a rule not to let anybody in or let any one know what we were doing there, outside of the parties directly interested; no person could tell from the outside anything about the course of the underground workings.

There is no outcrop of mineral between the *the* Titus shaft and Flagstaff; I have never seen any; there are croppings at each discovery. The Flagstaff discovery is on the footwall croppings; don't know whether the Titus croppings are on foot or hanging wall.

Cross-examination.—Was in the Flagstaff from December, 1873, to December, 1876; the Flagstaff Company was in possession during that time; in all our workings during that time, we never departed from the Flagstaff vein; in all these workings, there
51 is but one vein or lode, and all the ore that we took out was taken out of that vein; it was, perhaps, not always continuous ore, but it was in one vein; there is no doubt of that; Mr. Tarbet never applied to me for permission to go into the mine.

Point "K" on the map is the point where the connection was made between the two mines. That drift was started in May, 1875, it was worked until December, 1875, most of the time; was run a little distance beyond that point; at that time we could hear working going on all around us; we were sinking at point "K" when they broke into us; they raised up, and we came together.

Previous to them breaking into us, the Flagstaff was in exclusive possession of all the works to the northwest; we did not pass into any of Tarbet's works and never took possession of, or pretended to take possession of any part of his workings, nor did we take any ore out of his works; they were in actual possession, as I understood of Tarbet and his co-tenants. During the time I worked for the Flagstaff, the surface between the two discoveries, was unoccupied by any one, to all appearances, it was vacant, unoccupied ground.

I presume I have an interest in the event of this suit; I was one of six to sign a note, to raise money to redeem five-eighths of the South Star and Titus mine, which had been sold under a judgment that was a lien on the mine; I understand the money raised on the note was to be loaned to Miss Tarbet, and the security given, was the mine, and were to share in the profits made out of it.

The object and reason of raising money on the note, was to enable Miss Tarbet to save her property from the effect of a judgment, as I understood it; did not sign the note to start this suit.

I was originally a defendant in this suit, and it was dis-
52 missed against me at my solicitation; can't say that it was agreed that I should be dismissed before or after I signed the note; when I spoke to Mr. Bennett (plaintiff's attorney) he said it would be dismissed as to all the defendants except the Flagstaff Company.

About five-sixths of the workings of the Flagstaff mine are northeast of the discovery; many of the workings on both sides of discovery, are not on the map.

Mr. Ivins was called by plaintiff as a witness, but his testimony related to the amount and value of ore taken out by the defendant, and as these questions are not involved in this notice it is omitted.

H. C. Callahan was called and sworn as a witness on behalf of the plaintiff, and in matters material to the issue in this notice, testified as follows:

I was foreman of the South Star and Titus mine from September, 1875, till March, 1876; was there when the Flagstaff and Titus works came together; they came together between points "J" and "K" on the map.

The Flagstaff work was driven further on, fifty or sixty feet; the connection was made on ore right in the hanging-wall; the Flagstaff and Titus works, connected at several other points, at "L" and at "K;" this was after 13th December, 1875; there is a level continuing in from the Discovery shaft, the first level above the tunnel, about 200 feet to the northwest, it does not show on the map; there are other levels between this and the surface, and works all along to the connection with the Flagstaff; the drift from the car level, connects with the Flagstaff workings; when we got to the Flagstaff workings, we found the ore all worked out.

Cross-examined.—The car level is the first level above the tunnel level; that work was done by Mose Hirschman.

53 The workings at the connection were made by a raise from Titus works. I was directing the Titus workings at that time.

Q. What did you make that raise for? We made that raise on ore for the purpose of finding where the Flagstaff was, and to trace them out; they were sinking, and we were raising, and we broke in together. I had been at work in the mine from May previous; during that time the Flagstaff was at work in the vicinity; from what we could hear, they seemed to be working all around us. I was at work for Tarbet and the South Star and Titus Company; I told Tarbet they were working there; were aware of the fact they were working on what we supposed was the same vein, had spoken of it a number of times, when he (Tarbet) was up there; when I took charge Tarbet told me the Titus was 600 feet in length, and if we encountered the Flagstaff, to trace them out, if we could; wanted the tracing on ore, and we did it; the ore from the discovery was continuous to the point of connection; followed on ore clear through to the Flagstaff.

Q. How long before you broke into the Flagstaff was it that you told him (Tarbet) the Flagstaff was on that ground? I could not say—it was a common subject of talk at the mine, that the Flagstaff was taking our ore from the time I first went there.

A. Hanauer was called by the plaintiff as to the value of ores, etc., but his testimony has no bearing on the motion, and is omitted.

Louis Martin was called and examined as a witness for plaintiff, and testified as follows on matters material to this motion:

Have worked in the Flagstaff mine since January, 1874, and am

familiar with it; was there when the worke came together in December, 1875.

54 Q. Was Tarbet or his workmen in possession of any part of the Flagstaff works on December 13, 1875? They came in and took part of one level at one time and fortified it.

Q. How much of the works did they take? They took a level which controlled about 100 feet of the works; at least they presented a six-shooter at me when I went to go in, and told me to stay out. They have done very little work there since. After the connection was made, but little ore was taken out of the Flagstaff works (southeast of main shaft).

The plaintiff here rested the case, and thereupon the defendant moved for a non-suit as follows:

The defendant moves the court for a judgment of non-suit, on the ground that the plaintiff has failed to prove a sufficient case for the jury in the following particulars:

First. The plaintiff has failed to show that she or her assignee, or predecessor, were in the actual possession of the ground or premises, when the trespass was alleged to have been committed at the time of the trespass, or at the date of the bringing the action, or since.

Second. The plaintiff failed to show any exclusive possession of the premises at the time aforesaid.

The evidence on the part of the plaintiff shows that the defendant, during all the time, was in the actual possession of the premises, and all of that portion from which it excavated or removed any ores, and that such possession was accompanied with a claim of title to the premises from which it removed ores.

Fourth. It is alleged in the complaint, and stands admitted by the pleadings, that the defendant extracted the ore, for the conversion of which damages are sought in this suit, under a claim and color of title to the lode or premises containing such ore, adverse to the plaintiff.

55 Fifth. The plaintiff has shown no cause of action, because it appears that the plaintiff is only one of several tenants in common, against whom the alleged trespass was committed, and the suit can only be maintained for all.

The court overruled the motion and the defendant excepted to the ruling, and the exception was allowed, and the ruling is here assigned for error.

The defendant then offered in evidence, deed marked Exhibit No. 1, which was received and read to the jury. (See Exhibit No. 1.)

Defendants offer in evidence patent of the United States for Flagstaff claim and lode, which was received and read. (Exhibit No. 2.)

Defendants offer in evidence deed (Exhibit No. 3)—read to the jury.

George Cullins and Louis Martin were called and sworn for defendant, but their testimony had no bearing on the questions involved on the motion, and is therefore omitted.

Moses Hirschman was then called as a witness for the defendant, and testified in matters material to this motion, as follows:

I am acquainted with the Flagstaff, and South Star and Titus mines; was superintendent of the latter from October, 1874, till June, 1875, and superintendent of the Flagstaff from December 23, 1876, till the present time, and know all the workings in each. At the time I took charge of the South Star and Titus, there were two shafts, one called Discovery and the other the Working shaft, they were about 25 feet apart at the top and were connected under ground. Their connection was about 170 feet from the surface. The works from the bottom of the shafts ran mainly northwesterly about 83 feet. The principal work was done all around in the bottom of the two shafts. I did my work northwesterly, north of northwesterly—
right in ore; I ran cuts up and down and across for ore when-
56 ever I could get it. I ran 135 on ore or pipes and bunches.

While I was doing this work I knew that other persons were at work in the vicinity; didn't then know who it was. I reported it to Tarbet. I started my main level directly toward the Flagstaff. I ran it 80 or 90 feet, and found that it was the Flagstaff that was working near us. I continued my work about six weeks and was told to stop. Tarbet told me he didn't want to run any further in that direction; didn't want to have any trouble with the Flagstaff.

I had three shifts in when I was told to stop.

The Flagstaff and the South Star and Titus works are on the same lode. I first saw the works connecting the two mines last November, 1876.

From the point where the Titus works were in June, 1875, where I left to the point of connection, is about 100 feet.

Have had several conversations with Tarbet about the identity of the Flagstaff and Titus mines. Have had a conversation with him as to his knowledge of their identity, when he made his deed to the Salt Lake Mining Company, in December, 1874. I told Tarbet that I liked No. 1 Titus, and that I thought Woodman's interest could be bought, and asked him his opinion of the whole mine. He said No. 1 was the number, and to go in and buy it. He said there was no doubt it was the same lode as the Flagstaff—could not be anything else. He spoke of the re-location of Nos. 2 and 3; said No. 1 was the spot—that he didn't go much on No. 2 and 3, but he wanted a nice stretch of ground.

The course of the vein is, in my opinion, a little north of northeast. This opinion is based upon what I have seen in the lower workings as well as on the surface. The dip is probably between 44 and 48° from the horizontal. The surface-ground between the

two mines had nothing done on it when I went to take
57 charge, in 1874. It was not used for any purpose except a trail on it to get timbers from Big Cottonwood to the Flagstaff. It was not used by the South Star and Titus. In 1875 Geist had a tramway across it to get his ore out of the Flagstaff. Neither Tarbet nor any of the South Star Company occupied any part of the surface marked as No. 2 at any time. In 1874 I heard the Flagstaff at work in there. I saw persons at work in the Flagstaff tunnel in 1872. It has been occupied by the Flagstaff ever since. Under a lease Mr. Billing occupies it.

Cross-examination.—I can trace the vein into Big Cottonwood. Never did any work on the surface over them. I told you I traced it by the 5″ level. I think I can trace it on the surface. I give the dip of the vein from the hanging-wall underground. The tracing on the surface is not mere opinion—it is from croppings.

Q. How do you know it is not the cropping of another vein? From a regular survey. Our depth by the incline is 512 feet from top of incline. Total depth from the surface about 700 feet. The 5″ level from the incline is now 944 feet long.

Q. Judging from the point where the face of the incline is; furthest point in your course on the surface, and pick out the croppings? I take the level and suppose I am between foot and hanging wall of the ledge; my surveyor comes along and gets his notes, and goes up on top and surveys the surface.

Q. Isn't that all on the assumption that the incline is perfectly regular? That vein lays perfectly regular, the hanging and foot wall both.

Q. Starting from the lower drift or level you come up on the surface and find croppings, and you say your surveyor tells you the point where they should be, and you suppose they are there? No, sir; they are there.

58 Q. Isn't this in the assumption that the mine is perfectly regular; do you not find slips and breaks in it, and get regular again in fifty, or two or three hundred feet? It is pretty regular.

Q. There may be slips and breaks in them, and you may be mistaken? Any man may be mistaken.

Q. Did you buy when you had this talk in December with Tarbet about the mine? Frank Randall bought it for Ottenheimer; I made the negotiation; Ottenheimer was my brother-in-law; he never saw the mine; I was the superintendent and advised him to buy; I thought it was a good thing; I was superintendent up to June, 1875; there is difference of opinion as to whether I was discharged or not; I claimed to be agent in there, and was hired by the year; Tarbet and I quarreled then; been in trouble since.

Q. Haven't you, to me, and several others, on several occasions since your quarrel with Tarbet in 1875, threatened to beat Tarbet out of his property or injure him in his rights, or words to that effect? I have said that I would "stay" with him, and I have

"stayed" with him; I have done so in order that he has got to do the square thing; I stick to it; he has injured me and he has got to make it right; I am now superintendent of the Flagstaff mine; have been since December last; understood Geist had a lease on the Flagstaff, and erected the tramway for his own convenience; don't know that the Flagstaff ever used it after he left; at the time Tarbet ordered me to stop running that drift it was not because I was running into the hanging-wall; that was another drift; he said he didn't want any trouble with the Flagstaff; it was in the tunnel that Tarbet claimed I had run into country rock.

Re-direct examination.—It was known all over at that time that thel Flagstaff was mining on that ground; I told Mr. Tarbet to serve a notice on Mr. Patrick or let me go ahead and come on to them; he protested and would not let me do it, and let it go.

59 Defendants offer in evidence affidavit of George L. Howard, Exhibit No. 4; read to the jury; objection that it was, by affidavit, waived.

William Groesbeck was then called, sworn, and examined, and testified as follows:

I know the Flagstaff mine in Little Cottonwood; I was one of the locators of it, and have known it for six or seven years; know of its early workings; remember the time when we sold out—in 1871, I think; I had a conversation with Tarbet about the identity of the South Star and Titus lode and the Flagstaff, both before and after the application for patent was made; the same season, and before the sale.

Q. State what he said about the identity of the two locations? I went to see Tarbet while the suit was going on to see if we couldn't compromise, and he said he couldn't compromise, for he thought the Titus and South Star was in the same vein as the Flagstaff. He did not say that the Flagstaff was located to protect the other location; he talked the matter over more than once as stated. He said he could not compromise; he thought they were both on the same vein. He sold in the fall of 1871, and gave possession afterwards to an agent of the Flagstaff Company. The company has been there in possession ever since; none of the works run in the direction of the South Star and Titus at that time; he started the main tunnel into the Flagstaff before we sold; it was started in the fall of 1870, or spring of 1871; was being run in when we sold out; had been in possession of the Flagstaff, when we sold out, two or three years.

At the time of the sale, Tarbet, I think, had a little prospect hole out one side, between the discovery points of the two mines, which he called the South Star. The surface between them was not occupied or used by any one that I know of; he ran down two
60 shafts, one right at Flagstaff discovery, the other 12 or 15 feet from it; they were connected by a level at the bottom. The new one was down the hill, southeast from Discovery shaft.

Cross-examined.—At the time we were trying to compromise, Tarbet was claiming an interest in the Flagstaff, under an earlier location made by him and Snyder.

Q. Wasn't that the claim you were talking about compromising? Well, he claimed that he was in with Snyder and we claimed he was not, and we were trying to compromise; he claimed one-fifth interest, I think.

Q. Was not the Flagstaff tunnel started on the idea that the Flagstaff vein ran northerly and southerly, and does not that account for its direction? No; I don't think we saw it northerly and southerly; don't know the reason the tunnel was run in the direction it was; we had not tapped the mine when we sold out. The work on the map looks about the way we run them. I think there should be another drift laid down to the northwest.

John A. Groesbeck was then called and sworn as a witness, and testified on behalf of the defendant as follows:

I was one of the original locators of the Flagstaff mine—owned one-eighth in it; I went there on the 10th of February, 1871; when I went, there was two shafts down and sloped out to the northwest about 200 feet. One shaft was probably 200 feet deep, and the other in the neighborhood of 300 feet deep. The one to the southeast was the deeper one; it is about 15 feet from the other; was there two years ago; that shaft was there then; don't know whether it is used or not, nor what it is now called. We delivered possession of the mine in January or February, 1872; it was to
61 Maxwell for the Flagstaff Silver Mining Company; he was superintendent, and worked the mine for some time after.

Before we had sold, we had started the tunnel about 400 feet below the Discovery shaft, and in two or three hundred feet, when we delivered it over. No person occupied the ground through which it run at the time. The course of the vein at the time we quit was about northwest and southeast—dip 45 degrees into the hill. I know the South Star and Titus location; it is lower down the hill than Flagstaff—hill very steep between them; when we quit work the tunnel was in 30 or 40 feet beyond the head—perhaps 50 feet.

Cross-examined.—We started the tunnel to strike the bottom of the shaft; when I first went to the claim there was a shaft down at Discovery about 28 feet; this was February 10th, 1870.

George Cullins was recalled by the defendant, and testified that the two shafts laid down on the map as the "Discovery" and "Geist" shafts, were the only two shafts in that vicinity from the surface; there was winzes and raises connected with them, but no other openings to the surface from the works below, when we went there first.

The defendant there rested its case.

The plaintiff then offered in evidence a certified copy of the protest of the orignal plaintiff in this action; Alexander Tarbet filed in the U. S. Land Office against the application of the Salt Lake Mining Company for a patent for the Flagstaff Lode, also the bill in chancery filed on the equity side of this court on the 19th of May, 1871, in pursuance of the protest in which said Tarbet was plaintiff and the Salt Lake Mining Company defendant.

Said offers were explained by the plaintiff's counsel to be for the purpose of explaining the deed of conveyance made by Tar-
62 bet to the Salt Lake Mining Company, dated September 16th, 1871, and read in evidence by defendant as showing the subject-matter of the deed.

The notice of location of the Flagstaff lode constituted a part of said protest, and is in the words and figures following:

DEFENDANT'S EXHIBITS, No. 1.

Flagstaff Lode.

Notice is hereby given that we, the undersigned, claim twenty-two hundred feet of this vein or lode, together with all dips, spurs, angles, and variations, to be known as the Flagstaff. Course of lode, northerly and southerly.

CLAIMS NORTHERLY.		CLAIMS SOUTHERLY.	
No. 1, Joseph S. Wing	200 feet.	No. 1, John Snyder	200 feet.
No. 2, Stephen Groesbeck	200 feet.	No. 2, J. A. Groesbeck	200 feet.
No 3, N. Groesbeck	200 feet.	No. 3, N. H. Groesbeck	200 feet.
No. 4, Wm. Groesbeck	200 feet.	No. 4, Jno. A. Groesbeck	200 feet.
No. 5, Alexander Tarbet	200 feet.	No. 5, Ole Wideburg	200 feet.

Claims No. one, two, three, and four, north, and claims No. one, two, three, and four south, and the Discovery, to be worked in company and undivided.

Little Cottonwood Mining District, Salt Lake county, Utah Territory, March 19th, A. D. 1870.

Filed for record, March 25th, 1870, at 11 A. M.

Recorded April 9th, 1870.

J. F. WOODMAN, *Recorder.*
Pr. W. W. CHISHOLM, *Deputy.*

63 RECORDER'S OFFICE, LITTLE COTTONWOOD MINING DISTRICT, UTAH TERRITORY, *August 30th*, 1875.

I, the undersigned, W. P. Rowe, recorder of the said district, do hereby certify that the within is a full, true, and correct copy of the location notice of the Flagstaff lode, as recorded in Book "A" of location, page 43, of the records of this district.

[SEAL.] WM. P. ROWE, *Recorder.*

Said exhibits show that Alexander Tarbet therein claimed to own an undivided interest in six hundred feet of the Flagstaff location and lode, commencing at the discovery point and running thence 300 feet northerly, and 300 feet southerly, being one-half of the discovery claim, and one-half in each of the claims adjoining thereto; basing said claim on an alleged location, prior to the location shown by said notice, and claiming that the Flagstaff location, shown by said notice was, as against him, void and of no effect.

The defendant objected to said exhibit as evidence on the ground that there is no ambiguity in the said deed, that it cannot be qualified or explained by collateral testimony.

The objection was overruled, and the defendant excepted and the exception allowed, and is here assigned as error.

The plaintiff then recalled in rebuttal, Thomas Marshall, esq., who testified as follows:

That Exhibits "M" the protect bill in chancery in evidence above, were filed by witness, as the attorney of said Alexander Tarbet; witness further testified: before the 16th of Sep-
64 tember, 1871, Marshall and Carter had an interest in the Flagstaff lode, my impression is it was by deed; at that time the firm of Marshall and Carter had no interest in the South Star and Titus mine, or afterwards had one-eighth interest; think we acquired it in January, 1872. I was a party to the negotiation that led to the making of the deed (to the Salt Lake Mining Company, of September 14, 1871).

Q. What was the object of the negotiation which led to the making of that deed?

Defendants object that the deed is not ambiguous and cannot be explained or qualified by collateral testimony; that it is the final act of the parties, the culmination of the negotiation and must speak for itself, unless there is some ambiguity, which there is not.

Objection overruled and the defendant excepted to the ruling, and the exception allowed, and is here assigned as error.

The interest Mr. Tarbet had in the Flagstaff location; the same property that is embraced in the application for patent and protest, and bill in equity.

Defendants moved to strike out the answer, because it is evidence in contradiction of the deed; motion denied, and the defendant excepted to the ruling, and the exception was allowed, and is here assigned as error.

Witness continued: It was the lode described in the application for patent north and south; I did not at that time know there was such a claim as the South Star and Titus in existence. It was under that patent filed by Mr. Tarbet; he claimed one-half interest in 600 feet, and the whole of No. 1 north in the claim, and the protest was put and the patent delayed, and between the time of bring-

ing the suit, and the time of this compromise, Marshall and Carter get their one-third interest, whether by deed or not, can't
65 say, my impression is by deed, as I am enjoined in the deed to the Salt Lake Mining Company.

The protest we filed against that application for patent and the compromise was made, enabling them to obtain their patent; the application was pending when the compromise was effected.

Cross-examined by defendant.—Never saw the Flagstaff workings in my life; at the time of these negotiations I think the Groesbecks were in possession, but of course don't know, as I never saw the mine.

I did not know where the ledge run, except what was told me in my office.

Q. You didn't intend to convey a ledge running in any particular direction? I didn't know of any other ledge at that time, and didn't know where that run.

Q. What you conveyed was your interest in that ledge? In that ledge or lode as claimed for patent; I certainly didn't intend to convey anything else.

Q. Did you have any intention to convey it in any particular direction? I intended to quit-claim everything I had in the ledge.

Afterwards we got an interest in the South Star and Titus, and in Lavinia, I think from Tarbet; had nothing to do with the re-location of Nos. 2 and 3; I knew it was going to be made; never was on the ground.

Each of the locators conveyed to us one-eighth of that ground; Lee and Tarbet both told me about the re-location.

Tarbet said they thought those numbers re-located, run in the vein matter or northwest, and the re-location was to be in the vein of course—the same ledge as the South Star and Titus.

Q. Do you know whether it was to cover the same vein as
66 the Flagstaff? That I do not know, I don't know whether at the time it was positively ascertained, by Mr. Tarbet, that it was the same vein; I think he said it was the same vein.

O. A. Palmer was then recalled to explain the map to the jury, but his testimony is immaterial to this motion and is omitted, and plaintiff rested.

Thereupon the defendant moved to strike out the notice of re-location of Nos. 2 and 3, Titus lode, on the ground that the plaintiff had not shown that the ground was subject to re-location, when it was attempted to be done.

Motion denied, and defendant excepted to the ruling, and the exception was allowed and is here assigned as error.

The cause was then argued to the court and jury, upon the law and facts, and afterwards the jury, at the request of the plaintiff, was instructed as follows:

In the District Court of the Third Judicial District, Territory of Utah, Salt Lake county.

HELEN TARBET, PLAINTIFF,
vs.
THE FLAGSTAFF SILVER MINING COMPANY OF Utah, (limited,) Defendant.

The plaintiff asks that the jury be instructed as follows:

First. This is an action for an alleged trespass and for damages; and the plaintiff to recover is required to show these things: that Alexander Tarbet was in possession of the premises, or some part thereof; that the defendant unlawfully entered premises
67 in his possession and extracted ore to his damage; and that the plaintiff has acquired the cause of action.

Given, M. S., judge.

Second. If you find that Alexander Tarbet during the time mentioned in the complaint, to wit, from January 1, 1873, to December 14, 1875, (being a period of 2 years, 11 months, and 14 days,) was in possession of the whole or an undivided interest of Nos. 1, 2, and 3 of the Titus mining claim, and ten feet off No. 1 of the South Star mining claim, holding the same in accordance with the mining laws and the customs of the miners of the mining district, and that the apex and course of the vein in dispute is within such surface; then, as against one subsequently entering, he is deemed to be possessed of the land within his boundaries to any depth, and also of the vein in the surface to any depth on its dip, though the vein in its dip downward passes the side line of the surface boundary and extends beneath other and adjoining lands, and a trespass upon such part of the vein on its dip, though beyond the side surface line, is unlawful to the same extent as a trespass on the vein inside of the surface boundary. This possession of the vein outside of the surface line, on its dip, is limited in two ways: by the length of the course of the vein within the surface; and, by an extension of the end lines of the surface claim vertically, and in their own direction, so as to intersect the vein on its dip; and the right of a possessor to recover for trespass on the vein is subject to only these restrictions.

Given, M. S., judge.

Third. To constitute possession of a mining claim, it is not necessary that the whole surface be worked, or actually occupied, or that it be fenced, or that others than the possessor be excluded from passing over it; but if it be defined as to extent and bounda-
68 ries in accordance with law and the custom of miners, and held as such property is usually held, then actual occupation of one or more points, with a claim of possession to the whole, is a sufficient possession of the whole upon which to maintain trespass against one who unlawfully enters.

Given, M. S., judge.

Fourth. If you find Nos. 2 and 3, of the original location of the Titus mine, segregated locations, each locator taking and holding his respective claim; that the locators of these claims failed to do upon them the work required, and within the time required by law and the customs and rules of the miners of the district, they were subject to re-location.

Given, M. S., judge.

Fifth. After the re-location of Nos. 2 and 3 of the Titus, it was competent for the owners of Nos. 1, 2, and 3 of the Titus, and of 10 feet off the South Star, to enter into an agreement to hold and work said ground in common, and if you find such an agreement was made and carried out, work done on any one of the claims so held in common would apply to the whole ground, and preserve, so far as work is concerned, the right to the possession of the whole ground.

Given, M. S., judge.

Sixth. Whether the re-location of Nos. 2 and 3 of the Titus mining claim was regular or irregular if Alexander Tarbet and his co-owners held the possession of said claims, under a claim to the possessory title founded on such re-location, with well-defined boundaries, they can maintain trespass against one who subsequently entered on such possession without right.

Given, M. S., judge.

Seventh. If you find that before such re-location, the defendant had by means of the Giest shaft, and limited workings around it, entered upon a small portion of No. 3, of the Titus, but without title or color of title, it would still be liable for entry upon
69 other portions of said No. 3, after the re-location, if made without right, and the said Tarbet and his associates, were in the lawful possession of such portions of the claim.

Given, M. S., judge.

Eighth. The defendant has not shown any title or color of title to any part of the vein, except so much of its length on the course as lies within the Flagstaff surface, and the dip of the vein for that length; and it has shown no title or color of title to any of the surface of the South Star and Titus mining claim, except to so much of No. 3 as lies within the patented surface of the Flagstaff mining claim.

Given, M. S., judge.

Ninth. If you find that Alexander Tarbet, alone or with his co-owners, was in the lawful possession of Nos. 1, 2, and 3 of the Titus mining claim, and that the defendant without right and by means of under ground and concealed workings, entered upon that part of the vein belonging to the surface so occupied, the occupation of such workings, even at the time of the commencement of the action, is not a defence to this action.

Given, M. S., judge.

Tenth. If you find for the plaintiff, and that she is entitled to

substantial damages, then she is entitled to recover six-eighths of the damages caused by the defendant's trespasses, and the main element of damage is the net value of the ore extracted from premises in possession of Alex. Tarbet; that is, six-eighths of the value of the ore after deducting the cost of mining and marketing; and you may also, in your discretion, take into consideration the length of time the defendant has had the use of such net value, and include in a gross sum as damages, six-eighths of the value
70 of the use of such money, not exceeding ten per cent. per annum, the legal rate of interest.

Given, M. S., judge.

BENNETT & HARKNESS,
Plaintiff's Attorneys.

Endorsed: Filed October 6, 1877. C. S. Hill, clerk.

To which instructions the defendant filed the following exceptions, which were each allowed, and the ruling assigned here as error.

ALEXANDER TARBET, PLAINTIFF,
vs.
FLAGSTAFF SILVER MINING COMPANY of Utah (limited), Defendant.

The defendant objects to the first instruction asked by the plaintiff in this action.

Objection to first instruction:

That it is erroneous in not requiring that the plaintiff's "possession shall be actual and lawful," and leaves the jury to infer that a constructive possession, which is lawful, will overcome our actual adverse possession under a claim of title in this action, and sufficient to enable the plaintiff to recover.

2d. To the second instruction, for the same reason assigned above, and for the further reason that it seeks to apply the law providing for the extension of end lines passed in 1872 to a location made under the law of 1866.

3d. Because it places a trespasser, without any claim or
71 title, on an equality with one who enters under an honest claim or title, and there is no pretence that we entered as naked trespassers.

4th. To the fourth instruction, because it submits the question as to whether the claims were held as segregated claims to the jury as a question of fact, and because it gives the right of re-location upon the forfeiture by the original claimants, without any limitations upon any existing rights which may have accrued to other intervening parties.

To the fifth, because it provides that a secret agreement made by the claimants may bind the claims and rights of other parties.

To the sixth, because it asserts the right of a claimant in "possession" only constructive to move in trespass against one entering without right, though the entry was made under claim of title, and is a mere obstruction, because, in this case, it appears the defendants were in actual possession and claiming title.

To the seventh, because if the entry made by defendant in other portions of the ground, not originally in its possession, were followed by retention of the premises entered under an adverse claim, the plaintiff can not recover in trespass.

To the eighth, because the defendant has shown the grant by patent to the Flagstaff lode for a greater distance from the initial point than was reached in the disputed workings, and did the work under said patent and under the deed, and it does appear that all the work complained of was on that lode.

Ninth. To the ninth, because it is erroneous in not defining what possession is necessary to make defendant a trespasser in the work done, and makes an actual and continuous possession under claim of title no defence to the action, which is not law. Second, because it makes an illegal trespass underground differ in legal
72 effect from any other, while it makes the like possession on the part of Tarbet actual malice, binding on the other party.

[Endorsed:] Filed October 6th, 1877. C. S. Hill, clerk.

The defendant thereupon requested the court to instruct the jury as follows:

Instructions asked by defendant:

First. This is an action of trespass, to recover the value of ores alleged to have been taken from certain mineral lands claimed, in part, by plaintiff's grantor as the "South Star and Titus" mine or lode, 610 feet in length. The plaintiff's claim is based upon alleged locations of the premises as mining claims in 1867 and 1872. The defendant claims adversely under a patent from the United States dated March 22d, 1872, upon a cest entry made on the *made on the* 18th of September, 1871, for the "Flagstaff" lode, 2,600 feet in length, together with the surface ground described in the patent. It is admitted by the parties, and must be accepted by the jury, that the lode or vein of mineral designated by these two names are one and the same lode.

Given, M. S., judge.

Second. The attention of the jury is called to the patent of the Flagstaff claim. This patent implies conclusively, in this action, that prior to its date, and the date of entry in the land office, the patentee was the owner of a valid location under the mining laws, upon and including the lode and premises described in the patent, and that all necessary preliminary proceedings took place to warrant the issuance of the patent. This patent also conclusively implies, in the absence of any prior grant, that the government, until

the issuance of this patent, had, in itself, and thereby conveyed to the patentee, defendant's grantor, the absolute and perfect legal title in fee.

Given, M. S., judge.

73 Third. The recitals in a patent are evidence of the facts recited, and in ascertaining what extent of said lode was conveyed by the patent, the whole of the patent, including all its recitals, must be looked to and considered.

Given, M. S., judge.

Fourth. By the act of Congress of July 26th, 1866, under which all these locations are claimed to have been made, it was the vein or lode of mineral that was located and claimed; the lode was the principal thing, and the surface area was a mere incident for the convenient working of the lode; the patent granted the lode, as such, irrespective of the surface area which an applicant was not bound to claim; it was his convenience for working the lode that controlled his location of the surface area; and the patentee under that act takes a fee simple title to the lode, to the full extent located and claimed under said act.

Refused, M. S., judge.

Fifth. In the very nature of the thing a lode or vein in its unworked and undeveloped state cannot be known and surveyed so as to plat it and make a diagram of it; the law does not require impossibilities, and must receive a reasonable construction. The diagram required to be filed by the applicant for a patent under the act of 1866, was a diagram of the surface area claimed, and this diagram might be extended laterally and otherwise as convenience in working this claim might suggest to the applicant.

Refused, M. S., judge.

Sixth. The patent under which the defendant claims, conveyed to the Salt Lake Mining Company, the defendants' grantor, the premises mentioned and described therein.

It was issued under the mining law of the United States, passed July, 1866, and in terms granted to the Salt Lake Mining

74 Company, its successors and assigns, the surface ground described in said patent, and the same described in the plaintiff's complaint, with the right to follow the Flagstaff lode or vein to the distance of 2,600 linear feet, with its dips, angles and variations to any depth, although it may enter the land adjoining. "The surface ground under said act of 1866 is granted and intended solely for the convenient working of the mine, and does not measure the grantee's right to the vein or lode in its course, or control the direction which he shall take."

Refused; the latter part being deemed the gist of it, and it is not deemed to be the law. M. S., judge.

Seventh. The plaintiff has not shown the issue of any patent to himself or his assignor, she is not therefore entitled to recover for any ores taken from any of the premises, which may be found to be

included in any patent that the proofs show has been granted to the defendant grantees. In respect, not only to the surface to which the defendant has the patent title, but in respect to the lode or ledge that belongs to such patented property, the plaintiff has no right or title, and can recover for no ores taken by defendant therefrom, or any part thereof.

Given, M. S., judge.

Eighth. If you find from the evidence that, while the application of defendant's grantor for a patent of the Flagstaff claim and lode was pending, Alexander Tarbet, claiming an adverse interest in said lode, had negotiations with said applicant for the purpose of enforcing and settling such adverse claim, and in such negotiation claimed and obtained a larger price for his adverse claim, on the ground and for the reason that the Flagstaff lode and the South Star and Titus lode were one and the same, and upon such settlement made a conveyance of the Flagstaff lode to the extent of 2,600 feet, and dismissed his adverse claim in the land office, thus the plaintiff
75 is not entitled to recover in this action, for in such a case said Tarbet must be held to have waived all right to any part of the Flagstaff lode, claimed by said applicant and conveyed by the patent; and any subsequent re-location of any part of the same by said Tarbet is void, and confers no right.

Refused; the proof does not justify it; M. S., judge.

Ninth. If the jury find from the evidence that Alexander Tarbet conveyed to the defendant grantee by his deed of September, 1872, all his interest in the Flagstaff lode, and that afterwards the defendant took the ores sued for, only from said Flagstaff lode, that plaintiff cannot recover.

Given, M. S., judge.

Tenth. In an action for *inquiries* done to real property, the title to the premises is only a collateral question, the gist of the action is the injury to the possession, and in this case, if the defendant had the actual and exclusive possession at the time of the alleged injury and until after suit brought, and claiming adversely to plaintiff, then the plaintiff's possession was not injured, for she had none, and therefore cannot recover.

Given, M. S., judge.

Eleventh. There are two kinds of possession of lands: One is actual, the other constructive, and both cannot exist at the same time in different parties. If one party has actual possession, the other cannot have constructive possession. If in this case you find that the defendant had actual possession of the premises from which it extracted ores, for which recovery is sought, then such premises were not in the possession of the plaintiff or her assignor, and no recovery can be had therefor, unless it appears that the plaintiff or her assignor had the right to such premises at the time of
76 the alleged taking, and entered into the possession before the commencement of this suit.

Refused, M. S., judge.

Twelfth. Actual possession of lands consists in subjecting the premises to the control and dominion of the claimant, and if the plaintiff's grantor did not have the control and dominion of the premises out of which the ores sued for were taken, he was not in actual possession, and if he was without actual possession at the time of the alleged trespass, and did not require it before suit, no recovery can be had in this action.

Refused, M. S., judge.

Thirteenth. Constructive possession of lands, consists in having a lawful title, with the right to enter into the possession, and if the plaintiff's assignor had a good title to the premises from which the ores were taken by the defendants, but not actual or constructive possession of them, then his right to the possession will not enable the plaintiff to recover in this suit.

Given, M. S., judge.

Fourteenth. If the plaintiff's assignor was in constructive possession of the premises from which the ores were taken, by reason of compliance with the mining law, and by actual occupancy of other portions of the premises not trespassed upon by defendant, then the plaintiff cannot recover for the ores taken, if defendant took them while it was claiming the said premises and ores adversely.

Refused, M. S., judge.

Fifteenth. If the jury find, that *prior* to the re-location of claims, number two and three of the "South Star and Titus," by Alex. Tarbet, the defendant, or its grantors, were in possession of the Flagstaff lode, under a color or claim of title, and that said lode extended from the Flagstaff discovery through to the dividing line between said claim, two and one, of said South Star and
77 Titus claim, then the jury are instructed, that said re-location by Tarbet, of claim 2 and 3, were null and void at the time, and that plaintiff has no title thereto, as against defendant, and she cannot now claim any damages whatever against defendant for any ore removed from either of said claims, 2 or 3.

Refused, M. S., judge.

Sixteenth. The jury are instructed that it devolves upon the plaintiff to show that at the time Alex. Tarbet attempted to re-locate claims 2 and 3, the ground then so re-located was subject to re-location under the mining laws of the mining district, in which the claim was situated, and under the mining laws of Congress; also that he complied with all the mining laws and rules then in force and applicable to said claims.

Refused, M. S., judge.

Seventeenth. The defendant is not liable for damages in this action for any of the ores extracted by it, while in actual possession of the portion of the lode and premises from which it was taken, while claiming title in good faith, adversely to plaintiff.

Given, M. S., judge.

Eighteenth. The jury are instructed, that in construing written instruments between parties to a contract, the intentions of the parties are to be ascertained from the written instruments themselves, unless those instruments disclose a doubt as to their meaning; and explanatory testimony cannot be used to raise the doubt and then explain it. It can only be resorted to when the doubt appears from the instrument itself; and if in this case the jury find from the deed of Tarbet, to the Salt Lake Mining Company, unexplained by other testimony, would convey, and was intended to convey, the Flagstaff lode, so as to include the premises on which the ores sued for were found, then the jury will not consider any testimony on the subject outside of the deed itself.

Refused, M. S., judge.

78 Nineteenth. If you find that the Flagstaff lode was regularly located and worked under the mining law, and patented to the grantee regularly, (and the patent is conclusive evidence of these facts,) "the owners of such lode have the right to the lode located for the length and distance claimed in the location notice, though the lode runs in a different direction from that in which it was supposed to run when discovered and located."

First instructions; Chambers vs. Pitts.

Refused; not applicable to this case; M. S., judge.

Endorsed: Filed October 6, 1877. C. S. Hill, clerk.

The court gave instructions Nos. 1, 2, 3, 7, 9, 10, 14, 16, and refused to give Nos. 4, 5, 6, 8, 11, 12, 13, 15, 17, and 18, to which ruling the defendants excepted, and the exception was allowed, and the same is here assigned as error.

The jury retired, and after an absence, returned their verdict for the plaintiff for the sum of $45,000 damages, and judgment was entered accordingly.

The defendant then moved for a stay of proceedings for sixty days, to enable it to file its notice of intention to move for new trial and prepare a statement thereon, which was granted by the court.

Thereafter, and within said sixty days, the defendant served on the plaintiff's attorney the following notice of intention to move for new trial, and the foregoing statement of the testimony and proceedings.

79 The District Court of the Third Judicial District of the Territory of Utah.

HELEN TARBET, PLAINTIFF,
vs.
FLAGSTAFF S. M. CO. ET AL., DEFENDANT.

Take notice, that the defendant, the Flagstaff Silver Mining Company of Utah (limited), on the day of December, 1877,

at the federal court-house, in Salt Lake City, Utah Territory, at the hour of 10 o'clock A. M., of said day, or as soon thereafter as counsel can be heard, will move the court for a new trial in this cause.

Said motion will be made and based on the following grounds:

First. Insufficiency of the evidence to justify the verdict of jury, and the verdict is against law.

Second. Errors in law occurring at the trial and excepted to by the defendant, to wit:

1st. The court erred in overruling the defendant's challenge to the competency of Nicholas Treweek as a juror.

2d. The court erred in admitting in evidence Exhibit "B" and "C" against the objection of the defendant.

3d. The court erred in admitting in evidence Exhibit "D" against the objection of the defendant.

4th. The court erred in admitting Exhibit "E" in evidence against the defendant's objection.

5th. The court erred in admitting F, G, H, I, J, K, against the defendant's objection, in evidence.

80 6th. The court erred in refusing the defendant's motion for non-suit, made on the ground that plaintiff failed to prove a sufficient case for the jury.

7th. The court erred in the admission of testimony to explain the deed of Alexander Tarbet to the Salt Lake Mining Company, of September, 1871, against the defendant's objection.

8th. The court erred in refusing defendant's motion to strike out the notice of the re-location by Tarbet and Lee, of Nos. 2 and 3, South Star and Titus; said motion being based on the ground that it had not been shown that the ground was subject to re-location.

9th. The court erred in refusing the instructions asked by defendant, to wit: No. 6, 8, 11, 12, 14, 15, 16, 17, and 18.

10th. The court erred in refusing instruction No. 13, as asked by defendant, and in adding the words "or constructive," in the 7th line of said instruction, and then giving it to the jury, against defendant's objection.

11th. The court erred in giving each of the instructions given at the request of the plaintiff—numbered from 1 to 10, inclusive—against the defendant's exceptions.

ROBERTSON & McBRIDE,
Defendant's Attorneys.

Assignment of Errors.

On the foregoing statement, the said defendant now comes and assigns the following errors as constituting the grounds of its motion for new trial.

First. Insufficiency of the evidence to justify the verdict, and that the verdict is against law, in this:

The testimony shows that the defendant while taking the ores, for which the suit is brought, was the owner of the vein from which

they were taken, or if not the true owner; was in the actual
81 possession of the ground from which they were taken at the time, and was so in the actual possession when the action was commenced.

Second. Errors in law occurring at the trial, and excepted to by the defendant:

1st. The court erred in overruling the defendant's challenge to the juror, Nicholas Treweek, for the reasons assigned in the record.

2d. The court erred in admitting in evidence Exhibit "B" and "C," for plaintiff.

3d. The court erred in admitting Exhibit "D," for plaintiff, in evidence.

4th. The court erred in admitttng Exhibit "E," for plaintiff, in evidence.

5th. The court erred in admitting Exhibits "F," "G," "H," "I," "J," and "K," in evidence for plaintiff.

6th. The court erred in refusing the defendant's motion for a non-suit.

7th. The court erred in admitting the testimony of Thomas Marshall, and the patent protest, and suit following the same, to explain the deed of September 16th, 1871, from Tarbet and others, to the Salt Lake Mining Company.

8th. The court erred in admitting in evidence for plaintiff, the notice of re-location of the Nos. 2 and 3, of the Titus lode, and in denying the defendant's motion to strike out said evidence afterwards.

9th. The court erred in refusing the instructions asked by defendant, and by the court refused.

10th. The court erred in refusing the instruction, No. 13, as asked, and in adding the words "or constructive," in the 7th line thereof, and then giving the same to the jury.

11th. The court erred in giving each of the instructions to the jury, as asked by the plaintiff and given.

82 Upon the foregoing statement, the pleadings and record herein, the plaintiff will move the court to set aside the verdict and judgment, and grant a new trial.

Endorsed: Filed December 6th, 1877.

C. S. HILL, *Clerk.*

By B. P. HILL, *Depaty Clerk.*

Plaintiff's Exhibit.

COUNTY RECORDER'S OFFICE,
SALT LAKE CITY, *August 20th*, 1877.

[Copy.] Exhibit "A."

TERRITORY OF UTAH, } *ss.*
COUNTY OF SALT LAKE. }

Notice.

We, the undersigned, claim each 200 feet and 200 for discovery in this lode, to be known as the Titus lode, running northwesterly,

and the South Star, running southeasterly. This lode is situated about three-fourths of a mile northwesterly from the North Star lode, in Little Cottonwood canon.

Titus Lode.

	Distance, northwest.	No. feet.
Titus Axen		1,200
Wm. Reis		2,200
A. Reis		3,200
O. R. Pratt		4,200
John Brown		5,200
James Wall		6,200
Edward Lavalle		7,200

South Star.

	Southeast.	No. feet.
	Titus Axen	1,200
83	A. A. Hirst.	2,200
	P. Routon	3,200
Charles McCormick		4,200
Henry Wagoner		5,200
Paul Englebrecht		6,200
Ed. McDonald		7,200

Recorded October 1st, 1867.

JAMES WALL, *Recorder.*

TERRITORY OF UTAH, } ss.
COUNTY OF SALT LAKE. }

I, Angus M. Cannon, recorder in and for said county, do hereby certify that the above and foregoing is a true and correct copy of the notice of locations of the *South Star and Titus lodes*, as appears of record in Mountain Lake Mining District, in Book "B," page 14, as deposited in my office, this the 20th day of August, A. D. 1877.

[SEAL.]

ANGUS M. CANNON,
Recorder Salt Lake County.

[EXHIBITS "B" AND "C."]

"B."—Local laws of Mountain Lake Mining District.

"C."—Local laws of Little Cottonwood Mining District.

It is stipulated that the above, as printed in pamphlet form, be used, and without insertion herein, at the hearing of their motion, and on any appeal from this court by either party hereto.

[EXHIBIT "D."]

TITUS LODE.

Re-location.

We, the undersigned, do hereby re-locate the following claims upon the Titus lode:

84 Claim No. 2, 200 feet, Alexander Tarbet.
Claim No. 3, 200 feet, Henry Lee.

The above claims being on the Titus lode, running in a northwest and southeasterly direction from the discovery claim of the Titus lode, said claims being vacant and abandoned under the mining laws of Little Cottonwood District, and subject to re-location.

ALEXANDER TARBET, No. 2.
HENRY LEE, No. 3.

Filed for record January 18th, 1772, at 3.21 P. M. Request of Henry Lee.

RECORDER'S OFFICE, LITTLE COTTONWOOD MINING DISTRICT, UTAH TERRITORY,
January 18*th*, 1872.

I, John McDonald, recorder of Little Cottonwood Mining District, do hereby certify the above to be a true copy of the re-location upon the Titus lode, recorded in Book "B" of location, page "156" of the records of this mining district,

JOHN McDONALD, *Recorder*.

[EXHIBIT "E."]

Deed made April 23d, 1868, by Titus Axen to Alexander Tarbet, for the consideration of $400, conveying by quit-claim two hundred feet in length in the Titus lode, claim No. 1, and two hundred feet in the South Star lode, claim No. 1, duly acknowledged and recorded in Mining Record Book "A," pages 36 and 37, Mountain Lake Mining Records, and certified by the county recorder of Salt Lake county.

[EXHIBIT "F."]

Deed made August 31st, 1868, by Alexander Tarbet to Anthony Ivins and Israel Ivins, for the consideration of $400, conveying by quit-claim 100 feet in South Star lode, No. 1, and 100 feet
85 in Titus lode, No. 1, duly acknowledged and recorded in Mountain Lake records and certified by the county recorder of Salt Lake county.

[EXHIBIT "G."]

Deed made July 7th, 1869, by Alexander Tarbet to Anthony Ivins and Israel Ivins, for the consideration of $200, conveying, by quit-claim, 100 feet undivided, in No. 1, South Star lode, duly acknowledged and recorded in the Mountain Lake Mining Records, and certified by the recorder of Salt Lake county.

[EXHIBIT "H."]

Deed made by Anthony and Israel Ivins to Alexander Tarbet for the consideration of $220 in No. 1, north from discovery claim,

100 feet in length on the lode, and in No. 1 south from discovery claim 10 feet adjoining discovery claim in the south—making 110 feet in all, duly acknowledged and recorded in mining district records and duly certified.

[EXHIBIT "I."]

Deed of quit-claim, dated January 30th, 1872, from Henry Lee to Alexander Tarbet, consideration $5, conveying six-eighths (150 feet) undivided in Titus lode, No. 3, in Little Cottonwood Mining District, duly acknowledged, recorded, and certified.

[EXHIBIT "J."]

Deed of quit-claim, dated January 20th, 1872, by Alexander Tarbet to Henry Lee, for the consideration of $5, conveying one-eighth of claim No. 2, Titus lode, in Little Cottonwood Mining District, consisting of 200 feet, duly acknowledged, recorded, and certified.

[EXHIBIT "K."]

Deed from Alexander Tarbet to Henry Lee, dated Janu-
86 ary 16th, 1872, conveying by quit-claim for the consideration of $5, the undivided one-eighth of the southern two hundred feet in discovery claim Titus lode, and of the northern 10 feet, including the discovery shaft of the South Star lode, Little Cottonwood District, duly acknowledged, recorded and certified.

[EXHIBIT "L."]

For value received, I, Alexander Tarbet, of Salt Lake City, Utah, hereby sell, assign, and transfer to Helen Tarbet, of the same place, all my claims and demands against the Flagstaff Silver Mining Company of Utah (limited), Erwin Davis, J. N. H. Patrick, and any and all other persons and parties, for damages for mining and extracting ore from the South Star and Titus mine, in Little Cottonwood Mining District, Salt Lake county, Utah, prior to the 5th day of June, 1876. Also, certain causes of action as set forth in a complaint in an action pending in the District Court for the 3d Judicial District of Utah, in which I am plaintiff, and the said Flagstaff Company and others, defendants, which complaint was filed December, 13th, 1875, and a summons issued thereon December 14th, 1875; said cause of action being for damages for entering and extracting ores from said mine, for 3 years prior to said action, and for an injunction and other relief, and I authorize the said Helen Tarbet to prosecute said action, in my name, or otherwise, and to collect and receive for her own benefit, all damages therein claimed and recoverable, and to obtain such other and further relief as may be proper and obtainable in said action.

Dated July 31st, 1877. ALEX. TARBET.

Witness: ROBERT HARKNESS.

87 DEFENDANT'S EXHIBITS, No. 1.

Flagstaff Lode.

Notice is hereby given, that we, the undersigned, claim twenty-two hundred feet of this vein or lode, together with all dips, spurs, angles, and variations to be known as the Flagstaff. Course of lode, northerly and southerly.

CLAIMS NORTHERLY.		CLAIMS SOUTHERLY.	
No. 1, Joseph S. Wing	200 feet.	No. 1, John Snyder	200 feet.
No. 2, Stephen Groesbeck	200 feet.	No. 2, J. A. Groesbeck	200 feet.
No. 3, N. Groesbeck	200 feet.	No. 3, N. H. Groesbeck	200 feet.
No. 4, Wm. Groesbeck	200 feet.	No. 4, Jno. A. Groesbeck	200 feet.
No. 5, Alexander Tarbet	200 feet.	No. 5, Ole Wideburgh	200 feet.

Claims No. one, two, three, and four north, and claims No. one, two, three, and four south, and the Discovery to be worked in company and undivided.

Little Cottonwood Mining District, Salt Lake county, Utah Territory, March 19th, A. D. 1870.

Filed for record March 25th, 1870, at 11 A. M.

Recorded April 9th, 1870.

W. F. WOODMAN, *Recorder.*

Pr. W. W. CHISHOLM, *Deputy.*

RECORDER'S OFFICE, LITTLE COTTONWOOD MINING DISTRICT, UTAH TERRITORY, *August 30th*, 1875.

I, the undersigned, W. P. Rowe, recorder of the said district, do hereby certify that the within and foregoing, is a full, true, and correct copy of the location notice of the Flagstaff lode, as recorded in Book "A" of location, page 43, of the records of this district.

[SEAL.] WM. P. ROWE, *Recorder.*

88 [EXHIBIT No. "2."]

See judgment roll. Answer of defendant, and of Tarbet, and Marshall and Carter, to Salt Lake Mining Company, September 16th, 1871.

[EXHIBIT No. "3."]

Deed from Salt Lake Mining Company by Nicholas Groesbeck, attorney in fact, to defendant, made December 14th, 1871, to the Flagstaff Silver Mining Company of Utah (limited), for the consideration of $5,000, conveying by quit-claim, "all that certain vein or deposit of ore, known as the Flagstaff, situate in the Little Cottonwood Mining District, Territory of Utah, consisting of 2,000 feet of said lode, vein, or deposit, and being claims numbers 1, 2, 3, and 4 northerly, and claims numbers 1, 2, 3, 4, and 5 southerly,

together with Discovery claim as per location filed in the recorder's office, for Little Cottonwood Mining District, on the 25th day of March, 1870, together with all the dips, spurs, angles, also all the metals, ores, gold and silver mining quartz, rock, metal, therein, and all rights, privileges, franchises, etc., thereto; incident, appendant, and appurtenant or therewith, usually had and enjoyed, and all the estate right, title, interest, etc., of said party therein."

Duly acknowledged, recorded, and certified—with power of attorney annexed, showing authority of party executing the same.

General Land Office,
Number 337.

Mineral Certificate,
Number 4.

THE UNITED STATES OF AMERICA.

To all to whom these presents shall come greeting:

Whereas, in pursuance of the act of Congress, approved
89 July 26th, 1866, "granting the right of way to ditch and canal owners over the public lands, and for other purposes," there have been deposited in the General Land Office, of the United States, the plat and field notes of survey of the claim of the *Salt Lake Mining Company* for twenty-six hundred (2,600) linear feet of the Flagstaff lode, accompanied by the certificate of the register of the land office, at Salt Lake, in the Territory of Utah, whereby it appears that in pursuance of said act of Congress, the said *Salt Lake Mining Company* did, on the 18th day of September, A. D. 1871, enter and pay for said claim, being mineral entry number 4, in the series of said office, designated as lot number 38, forming a portion of the unsurveyed public domain, in the Little Cottonwood Mining District, in the county of Salt Lake, and Territory of Utah, in the district of lands subject to sale at Salt Lake City, embracing *twenty-six hundred* (2,600) *linear feet of the Flagstaff lode*, bearing silver, with surface ground, as hereinafter described, for the convenient working of the mine, and according to the returns on file in the General Land Office, bounded, described, and platted as follows, with magnetic variation at eighteen (18) degrees, nine (9) minutes east, to wit:

Beginning at post No. 1, 4x4 inches square and three (3) feet long, from which the Discovery shaft on said Flagstaff lode bears south eighty-five (85) degrees, ten (10) minutes west, at the distance of sixty-six (66) feet and seven hundredths (7–100) of a foot; thence north thirty-six (36) degrees, east eleven (11) feet and twenty-five hundredths (25–100) of a foot to summit of Emma hill, thirteen hundred and fifty-six (1,356) feet and seven hundred and ninty-five thousandths (795–1,000) of a foot to post No. 2, 4x4 square, and three (3) feet long; thence north fifty-four (54) degrees, west one hundred (100) feet to post No. 3, 4x4 square, and
90 three (3) feet long on steep ledge of rocks, in mound of rocks; thence south thirty-six (36) degrees west, thirteen

hundred and forty-two (1,342) feet and one hundred and thirty-five thousandths (135–1,000) of a foot to post No. 4, 4x4 inches square and three (3) feet long, fourteen hundred and forty-three (1,443) feet and two hundred and five thousandths (205–1,000) of a foot to post No. 5, 4x4 inches square and three (3) feet long, two thousand and six hundred (2,600) feet to post No. 6, 4x4 inches square and three (3) feet long; thence south fifty-four (54) degrees east one hundred (100) feet to post No. 7, 4x4 inches square and three (3) feet long, from which United States mineral monument No. 3, bears south seventy-three (73) degrees fifty-one (51) minutes east, at the distance of two thousand four hundred and five (2,405) feet and the quarter section corner, between sections five (5) and thirty-two (32), on township line, between townships two (2) and three (3), south of range three (3), east of the Salt Lake meridian, bears south sixty-two (62) degrees twenty (20) minutes east at the distance of fourteen hundred and fifty (1,450) feet; thence from said post No. 7, hereinbefore described, north thirty-six (36) degrees east eleven hundred and forty-two (1,142) feet and one hundred and thirty-five thousandths (135–1,000) of a foot to post No. 8, 4x4 inches square and three (3) feet long, twelve hundred and forty-three (1,243) feet and two hundred and five thousandths (205–1,000) of a foot to the place of beginning; containing five (5) acres and nine hundred and sixty-eight thousandths (968–1,000) of an acre of land, more or less, as represented by yellow shading in the following plat.

United States mineral monument No. 3 bears south forty-four (44) degrees, thirty-five (35) minutes east at the distance of two thousand three hundred and fifteen (2,315) feet from the Discovery shaft of said Flagstaff mine.

91 Now know ye, that the United States of America, in consideration of the premises, and in conformity with said act of Congress, have given and granted, and by these presents do give and grant, unto the said Salt Lake Mining Company, and to their successors and assigns, the said mineral claim, or premises hereinbefore described, as lot number 38, forming a portion of the unsurveyed public domain, with the right to follow said Flagstaff vein, or lode, to the distance of twenty-six hundred (2,600) linear feet, with its dips, angles, and variations, to any depth, although it may gether with all the rights, privileges, immunities, and appurtenances, enter the land adjoining: To have and to hold said premises, to-of whatsoever nature, thereunto belonging, unto the said Salt Lake Mining Company, and to their successors and assigns forever; subject, nevertheless, to the following conditions and stipulations:

First. That the grant hereby made is restricted to one vein or lode, with surface ground as hereinbefore described, designated lot No. 38, forming a portion of the unsurveyed public domain, to wit: to the aforesaid Flagstaff vein, or lode, upon which the required amount has been expended in labor and improvements; and that

any other vein, or lode, should such exist within the above-described premises, shall be, and hereby is expressly excepted and excluded from these presents.

Second. That the premises hereby conveyed may be entered by the proprietor of any other vein, or lode, of quartz, or other rock, in place bearing gold, silver, cinnabar, or copper, which has been, or may be, patented to him by the United States, should the same be found to penetrate or intersect the mineral claim or premises hereinbefore described, for the purpose of extracting and removing the ore from such vein, or lode, its dips, angles, and variations.

Third. That in the absence of necessary legislation by
92 Congress, the legislature of Utah may provide rules for working the mine hereby granted, involving easements, drainage, and other necessary means to its complete development.

In testimony whereof, I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made *patent*, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twenty-second day of March, in the year of our Lord one thousand eight hundred and seventy-two, and of the independence of the United States the ninety-sixth.

By the President.

[SEAL.] (Signed) U. S. GRANT.
By J. PARRISH, *Secretary.*
C. B. BOYNTON,
Recorder of the General Land Office.

Recorded vol. 3, pp. 568 to 572.
Examined.

The foregoing statement of the evidence in the above cause, together with the exceptions of the defendant taken at the trial, having been filed within the time fixed by the order of the court, staying proceedings herein pending the motion for new trial, and the same having been duly served on the plaintiff's counsel, and the amendments suggested thereto by the plaintiff's counsel having been accepted by the defendant, and now are incorporated therein, it is therefore agreed by the said parties, plaintiff and defendant, that the foregoing statement contains all the evidence material to the issues involved in the motion for new trial, and the ex-
93 ceptions taken therein, and is full, true, and correct, except that no evidence as to the amount of ores taken, or extent of damages is included—no question as to excessive damages raised by the motion for new trial.

It is further stipulated, that upon any appeal taken in this action by either of the parties hereto, this statement shall, with the journal entries of the action of the court and exceptions thereto, stand as

and for a statement and bill of exceptions on appeal, without further statement.

December 6th, 1877. BENNETT & HARKNESS,
Plaintiff's Attorneys.
ROBERTSON & McBRIDE,
Defendant's Attorneys.

In District Court, Third Judicial District, of Utah Territory.

I hereby certify that the foregoing statement is a true and correct statement of the evidence, and that the proceedings and exceptions embodied therein were duly had, and taken and allowed, at the trial, and are of record in said action.

Dated December 6th, 1877. M. SCHAEFFER, *Judge.*

Notice of appeal to the Supreme Court of Utah Territory.

Please take notice, that the defendant above named, the Flagstaff Silver Mining Company of Utah, limited, in this action, hereby appeals to the Supreme Court of Utah Territory, from the
94 judgment rendered therein in favor of the plaintiff and against the defendant, and from the whole thereof, and also from the order of the district court, denying the defendant's motion for new trial, made and entered therein, and from the whole thereof.

ROBERTSON & McBRIDE,
Defendant's Attorneys.

To the clerk of said district court and to Bennett & Harkness, plaintiff's attorneys.

December 15th, 1877.

Endorsed: Service admitted by copy, this December 15th, 1877. Bennett & Harkness, plaintiff's attorneys. Filed December 15th, 1877. C. S. Hill, clerk.

Undertaking on Appeal.

Whereas, The Flagstaff Silver Mining Company of Utah, limited, defendant in the above-entitled action, is about to appeal to the Supreme Court of the Territory of Utah, from a judgment and order denying its motion for a new trial in the above-entitled action, which judgment was rendered in the District Court of the Third Judicial District of Utah Territory, on the 6th day of October, 1877, for the sum of $45,000, and the sum of $167.60 costs, taxed therein, and from the order of said court denying the defendant's motion for a new trial, made and entered in said court on the 6th day of December, 1877. Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, residents and householders of Salt Lake county, Utah Territory, do hereby, jointly and severally, un-
95 dertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be

awarded against it on the appeal, not exceeding three hundred dollars, to which amount we acknowledge ourselves, jointly and severally, bound.

Salt Lake City, December 15, 1877.

W. G. GALLIGHER. [SEAL.]
A. HANAUER. [SEAL.]

TERRITORY OF UTAH, } ss.
COUNTY OF SALT LAKE. }

A. Hanauer and William G. Galligher, the persons named in, and who subscribed the foregoing undertaking as sureties thereto, being each duly sworn, each for himself, says he is worth the amount named in said undertaking, as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution, and that he is a resident and freeholder of said county.

W. G. GALLIGHER,
A. HANAUER.

Subscribed and sworn to before me, this 15th day of December, A. D. 1877.

[SEAL.] SAMUEL E. MAY, *Notary Public.*

TERRITORY OF UTAH, } ss.
COUNTY OF SALT LAKE. }

I, C. S. Hill, clerk of the Third Judicial District Court, of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original complaint: Answer: Exhibit No. 1; order to show cause and return thereon; order overruling
96 motion for temporary injunction; order substituting Helen Tarbet, plaintiff; minute book entries, at time of trial; verdict; judgment on verdict; order overruling motion to include perpetual injunction in the judgment and granting time for defendant to file and serve statement on motion for a new trial; motion for new trial; order overruling motion for a new trial; statement on motion for a new trial; exceptions of defendant; instructions asked by the defendant; undertaking on appeal, and order of court fixing amount of undertaking on appeal in the above-entitled action filed in my office.

Witness my hand and the seal of said court, at Salt Lake City, this 26th day of December, A. D. 1877.

[SEAL.] C. S. HILL, *Clerk.*
By H. G. MCMILLAN, *Deputy Clerk.*

It is ordered that defendants in this action execute an undertaking on appeal in the sum of three hundred dollars, with good and sufficient sureties.

M. SCHAEFFER, *Judge.*

December 15th, 1877.
Filed December 17th, 1877.

C. S. HILL, *Clerk.*

By H. G. MCMILLAN, *Deputy Clerk.*

97 (On cover:) All the by-laws of Little Cottonwood Mining District, Salt Lake county, Utah Territory. / Exhibit "C," referred to on page 83 of printed transcript. E. T. Sprague, clerk.

98 [In force from 15th Aug., 1868, to Sept. 20th, 1869.]

BY-LAWS.

Article 1st. This district shall be called the "Cottonwoods Lake Mining District," and shall be bounded as follows: Commencing at the entrance of Little Cottonwood canon and running three miles south; thence easterly to the road running between Provo valley and Webber; thence northerly ten miles; thence westerly to place of beginning.

Art. 2nd. The record-books shall be kept within the limits of the said district, and shall be open for inspection.

Art. 3rd. That no person or company of persons shall be entitled to hold more than 200 feet as discovery of a lode, nor more than 200 feet for each person located, and the number of feet in all not to exceed forty-two hundred feet.

Art. 4th. All claims shall be recorded within twenty days after location, and a blazed tree, stake, or board shall designate the name of lode and the amount of ground claimed by the pre-emptors of the ledge, unless the parties hold the ground by constant labor thereon.

Art. 5th. Each lode shall be represented every year by twenty-five dollars' worth of labor actually performed on it; or else it will be considered abandoned, and be opened for re-location, unless it can be shown, to the satisfaction of the recorder, that $1,000 worth of work has been performed, or patent taken for same.

99 Art. 6th. The recorder's fees shall be fifty cents for each name put on record, and fifty cents for each abstract of ledge or part thereof, certified to by the recorder.

Art. 7th. Ten days' notice shall be given in writing, and placed in three separate places in the district, previous to any meeting for the revisions of the laws, and it shall require a two-thirds vote to alter the same.

TERRITORY OF UTAH, } ss.
COUNTY OF SALT LAKE. }

John McDonald, being duly sworn, deposes and says: That he is the mining recorder of Little Cottonwood Mining District, in the county of Salt Lake, in the Territory of Utah; that he has now in his possession and under his control the mining records of the said mining district; that the above and foregoing is a full, true, and correct copy of the by-laws, rules, regulations, and customs of the miners of the "Cottonwoods Lake Mining District," in the territory aforesaid, (the aforesaid Cottonwoods Lake Mining District, comprising the mining district now known under the name of the "Little Cotton-

wood Mining District," aforesaid,) in force therein from the fifteenth (15th) day of August, A. D. one thousand eight hundred and sixty-eight, (1868,) the date of the organization of the said "Cottonwoods Lake Mining District," until the twentieth (20th) day of September, A. D. one thousand eight hundred and sixty-nine, (1869,) as the same appears of record in the mining records of said Little Cottonwood Mining District, now in my possession, and under my control, as aforesaid.

Witness my hand this first (1st) day of December, A. D. 1873.

JOHN McDONALD, *Recorder.*

Subscribed and sworn to before me, this first (1st) day of December, A. D. 1873.

[SEAL.] J. A. VARNES, *Notary Public.*

100 [In force from 20th Sep., 1869, to June 2d, 1870.]

By-Laws of Little Cottonwood Mining District.

Article 1st. This district shall be known by the name of "Little Cottonwood Mining District," and is bounded as follows, to wit: Beginning at the toll-gate near the entrance to Little Cottonwood canon, and running south to the summit of the mountain; thence easterly along the summit to the centre of divide, between Big Cottonwood and Little Cottonwood canons; thence northerly along the summit to the centre of the mountain on the north side of the canon; thence westerly along the summit to a point due north of toll-gate; thence southerly to point of beginning.

Art. 2d. There shall be an officer for said district to be called the recorder, who shall be elected on the third Monday in August, by the miners of the district at their annual meeting.

Art. 3d. The recorder shall procure and keep a substantially bound book, to be called the "Book of Location," in which he shall record all notices of location claims, whether for mining or other purposes, connected therewith.

Art. 4th. He shall carefully keep and preserve all original papers filed with him for record, and deliver them, upon proper demand, to the person or persons entitled to receive the same, and faithfully do and perform all other acts and duties required of him by these laws.

101 Art. 5th. The recorder shall hold office for one (1) year, or until his successor is duly elected; *Provided*, however, that he may be removed at any time, for misconduct in office, or neglect of duty as prescribed by the laws of this district.

Art. 6th. The record books shall be kept within the limits of the district, and shall be kept open during business hours for examination and inspection.

Art. 7th. The recorder may appoint a deputy under him, for whose official acts he shall be held responsible.

Art. 8th. He shall note upon the back of each notice of location or other instrument, filed for record, the day and hour of filing thereof; and such instrument shall be deemed recorded from and after the date of such filing for record.

Art. 9th. When a claim shall have been located and recorded, he shall, upon request, make and deliver to the claimant, his agent or attorney, a certificate of such location and record, over his official signature, which certificate shall be conclusive evidence of the facts therein stated.

Art. 10th. All examinations of the record books must be made in the presence of the recorder or his deputy, and when his term of office shall expire, the recorder shall turn over to his successor all books, papers, and other property pertaining to his office.

Art. 11th. The recorder shall be authorized to demand and receive for his services the following fees, to wit: One ($1.00) dollar for each lode recorded; fifty cents (50 cts.) for each official certificate; and one ($1.00) dollar each for deeds, powers of attorney, or bills of sale.

Art. 12th. No person or company of persons shall be entitled to hold more than two hundred (200) feet as discovery of a lode, nor more than two hundred feet for each person located, and the number of feet in all shall not exceed three thousand (3,000) feet. The surface width requisite for mining or milling purposes, or for the convenient working of the same, shall not exceed fifty (50) feet on each side of the walls of said vein or lode.

Art. 13th. All claims shall be recorded within twenty days after location, and a blazed tree, stake, or board shall designate the name of lode, and the amount of ground claimed by the locators of the ledge, unless the parties shall hold the same by constant labor thereon.

102 Art. 14th. Each lode shall be represented every year by twenty-five dollars ($25.00) worth of labor actually performed thereon, otherwise it will be considered abandoned and be open for re-location, unless it can be shown to the satisfaction of the recorder that one thousand ($1,000) dollars worth of labor has been performed or a patent taken for the same. In case of any dispute arising in regard to the amount of labor performed, three disinterested miners shall be selected to decide the question.

Art. 15th. Any person or persons may locate a tunnel by posting at the point of commencement a notice such as is required in the location of a lode, specifying the name or names of the person or persons, claiming the right, the course such tunnel is intended to run, the lode or lodes it is intended to work, and by filing for record a similar notice in the recorder's office. Labor shall be performed thereon the same as required for holding a lode.

Art. 16th. No person shall be entitled to vote at any meeting of miners unless he owns a *bona fide* interest in a mining claim in this district.

Art. 17th. The by-laws of this district may be repealed, revised, or amended at any regular meeting that may be duly called by ten (10) or more *bona fide* claim-holders in said district.

Art. 18th. Ten days' notice shall be given in writing and posted in three separate places in the district, previous to any meeting for a revision of the laws, and it shall require a two-thirds vote to alter the same.

Art. 19th. All laws or part of laws in this district, conflicting with these laws, or with any of the mining laws of the United States are hereby repealed.

Art. 20th. These laws shall take effect and be in force from and after their passage.

TERRITORY OF UTAH, } ss.
COUNTY OF SALT LAKE. }

John McDonald, being duly sworn, deposes and says: That he is the mining recorder of Little Cottonwood Mining District, in the county of Salt Lake, in the Territory of Utah; that he has
103 now in his possession and under his control, the mining records of the said mining district; that the above and foregoing is a full, true, and correct copy of the by-laws, rules, regulations, and customs of the miners of said mining district, established and in force therein from the twentieth (20th) day of September, A. D. one thousand eight hundred and sixty-nine (1869), until the second (2d) day of June, A. D. one thousand eight hundred and seventy (1870), as the same appears of record in the mining records of said mining district, now in my possession, and under my control, as aforesaid.

Witness my hand this first day of December, A. D. 1873.

JOHN McDONALD, *Recorder.*

Subscribed and sworn to before me, this 1st day of December, A. D. 1873.

J. A. VARNES,
[SEAL.] *Notary Public.*

104 [In force from 2d June, 1870, to 8th June, 1872.]

By-laws of Little Cottonwood Mining District.

Article 1st. This district shall be known by the name of "Little Cottonwood Mining District," and is bounded as follows, to wit: Beginning at the toll-gate near the entrance to Little Cottonwood Canon, and running south to the summit of the mountain; thence easterly along the summit to the center of divide, between Big Cottonwood and Little Cottonwood Canons; thence northerly along the summit to the center of the mountain on the north side of the canon; thence westerly along the summit to a point due north of toll-gate; thence southerly to point of beginning.

Art. 2d. There shall be an officer for said district to be called the recorder, who shall be elected on the third Monday in August, by the miners of the district at their annual meeting.

Art. 3d. The recorder shall procure and keep a substantially bound book, to be called the "Book of Location," in which he shall record all notices of location claims, whether for mining or other purposes, connected therewith.

Art. 4th. He shall carefully keep and preserve all original papers filed with him for record, and deliver them, upon proper demand, to the person or persons entitled to receive the same, and faithfully do and perform all other acts and duties required of him by these laws.

105 Art. 5th. The recorder shall hold office for one (1) year, or until his successor is duly elected; *Provided*, however, that he may be removed at any time, for misconduct in office, or neglect of duty as prescribed by the laws of this district.

Art. 6th. The record books shall be kept within the limits of the district, and shall be kept open during business hours for examination and inspection.

Art. 7th. The recorder may appoint a deputy under him, for whose official acts he shall be held responsible.

Art. 8th. He shall note upon the back of each notice of location, or other instrument, filed for record, the day and hour of filing thereof; and such instrument shall be deemed recorded from and after the date of such filing for record.

Art. 9th. When a claim shall have been located and recorded, he shall, upon request, make and deliver to the claimant, his agent or attorney, a certificate of such location and record, over his official signature, which certificate shall be conclusive evidence of the facts therein stated.

Art. 10th. All examinations of the record books must be made in the presence of the recorder or his deputy, and when his term of office shall expire, the recorder shall turn over to his successor all books, papers, and other property pertaining to his office.

Art. 11th. The recorder shall be authorized to demand and receive for his services the following fees, to wit: For each lode recorded by any person or company of persons, $3.00; for each claim otherwise recorded, 50 cents; for each official certificate, 50 cents; for each deed, power of attorney, or bill of sale, $1.00.

Art. 12th. No person or company of persons shall be entitled to hold more than two hundred (200) feet as discovery of a lode, nor more than two hundred feet for each person located, and the number of feet in all shall not exceed three thousand (3,000) feet. The surface width requisite for mining or milling purposes, or for the convenient working of the same, shall not exceed fifty (50) feet on each side of the walls of said vein or lode. When it may become necessary for mining or milling purposes that an appurtenant or adjacent tract is requisite, the same shall not exceed in its limits a space four hundred feet (400) long by three hundred (300) feet in width; and such tract may be situated at the nearest available point within the limits of the district; *Provided*, the same shall not be distant more than one-half (½) mile from said vein or lode.

106 Art. 13th. All claims shall be recorded within twenty days after location, and a blazed tree, stake, or board shall designate the name of lode, and the amount of ground claimed by the locators of the ledge, unless the parties shall hold the same by constant labor thereon.

Art. 14th. Each lode shall be represented every year by twenty-five dollars ($25.00) worth of labor actually performed thereon, otherwise it will be considered abandoned and be open for re-location, unless it can be shown to the satisfaction of the recorder that one thousand ($1,000) dollars worth of labor has been performed or a patent taken for the same. In case of any dispute arising in regard to the amount of labor performed, three disinterested miners shall be selected to decide the question. In making a record of locations of any claim the same shall be definitely described with reference to some natural or artificial monument.

Art. 15th. Any person or persons may locate a tunnel by posting at the point of commencement a notice such as is required in the location of a lode, specifying the name or names of the person or persons, claiming the right, the course such tunnel is intended to run, the lode or lodes it is intended to work, and by filing for record a similar notice in the recorder's office. Labor shall be performed thereon the same as required for holding a lode.

Art. 16th. No person shall be entitled to vote at any meeting of miners unless he owns a *bona fide* interest in a mining claim in this district.

Art. 17th. The by-laws of this district may be repealed, revised, or amended at any regular meeting that may be duly called by ten (10) or more *bona fide* claim-holders in said district.

Art. 18th. Ten days' notice shall be given in writing and posted in three separate places in the district, previous to any meeting for a revision of the laws, and special meetings may be called in the same manner.

Art. 19th. All laws or parts of laws in this district, conflicting with these laws, or with any of the mining laws of the United States, are hereby repealed.

Art. 20th. These laws shall take effect and be in force from and after their passage.

TERRITORY OF UTAH, } ss.
COUNTY OF SALT LAKE. }

107 John McDonald, being duly sworn, deposes and says: That he is the mining recorder of Little Cottonwood Mining District, in the county of Salt Lake, in the Territory of Utah; that he has now in his possession and under his control, the mining records of the said mining district; that the above and foregoing is a full, true, and correct copy of the by-laws, rules, regulations, and customs of the miners of said mining district, established and in force therein from the second (2d) day of June, A. D. one thousand

eight hundred and seventy (1870), until the eighth (8th) day of June, A. D. one thousand eight hundred and seventy-two (1872), as the same appears of record in the mining records of said mining district, now in my possession, and under my control, as aforesaid.

Witness my hand this first (1st) day of December, A. D. 1873.

JOHN McDONALD, *Recorder.*

Subscribed and sworn to before me, this 1st day of December, A. D. 1873.

J. A. VARNES,
Notary Public.

[SEAL.]

108 [In force from 8th June, 1872.]

By-Laws of Little Cottonwood Mining District.

Article 1st. This district shall be known by the name of "Little Cottonwood Mining District," and is bounded as follows, to wit: Beginning at the toll-gate near the entrance to Little Cottonwood canon, and running south to the summit of the mountain; thence easterly along the summit to the centre of divide, between Big Cottonwood and Little Cottonwood canons; thence northerly along the summit to the centre of the mountain on the north side of the canon; thence westerly along the summit to a point due north of toll-gate; thence southerly to point of beginning.

Art. 2d. There shall *be* an annual meeting of the miners of the district, held on the third Monday in August of each year, for the purpose of electing a recorder for the district.

Art. 3d. The recorder shall procure and keep a substantially bound book, to be called the "Book of Location," in which he shall record all notices of location claims, whether for mining or other purposes, connected therewith.

Art. 4th. He shall carefully keep and preserve all original papers filed with him for record, and deliver them, upon proper demand, to the person or persons entitled to receive the same, and faithfully do and perform all other acts and duties required of him by these laws.

109 Art. 5th. The recorder shall hold office for one (1) year, or until his successor is duly elected; *Provided*, however, that he may be removed at any time, for misconduct in office or neglect of duty as prescribed by the laws of this district.

Art. 6th. The record books shall be kept within the limits of the district, and shall be kept open during business hours for examination and inspection.

Art. 7th. The recorder may appoint a deputy under him, for whose official acts he shall be held responsible.

Art. 8th. He shall note upon the back of each notice of location, or other instrument, filed for record, the day and hour of filing thereof; and such instruments shall be deemed recorded from and after the date of such filing for record.

Art. 9th. When a claim shall have been located and recorded, he shall, upon request, make and deliver to the claimant, his agent or attorney, a certificate of such location and record, over his official signature, which certificate shall be conclusive evidence of the facts therein stated.

Art. 10th. All examinations of the record books must be made in the presence of the recorder or his deputy, and when his term of office shall expire, the recorder shall turn over to his successor all books, papers, and other property pertaining to his office.

Art. 11th. The recorder shall be authorized to demand and receive for his services the following fees, to wit: For each claim or tunnel recorded, by any person or company of persons, $3.00; for each deed, power of attorney, or bill of sale, $2.00; for each transcript or official certificate, $1.00.

Art. 12th. A mining claim, whether located by one or more persons, may equal, but shall not exceed, fifteen hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than fifty feet on each side of the middle of the vein at the surface, nor shall any claim be limited to less than fifty feet, except where adverse rights existing at the adoption of this by-law, shall render such limitation necessary. When it may become necessary for building or other purposes that an appurtenant or adjacent tract is requisite, the same shall not exceed in its limits a space three hundred feet square, and such tract may be situated at the nearest available point within the limits of the district.

110 Art. 13th. Locations of claims or tunnels shall be made by posting on a tree, substantial stake or monument at the point of commencement, a legible notice, stating the date of location, the number of feet in length of the claim or tunnel, the number of feet each way from notice, both in length and width, its course, and the name or names of the person or persons making the location; and such notice shall so describe such location, that its boundaries can be readily traced on the surface. All records of locations shall contain such a description of the claim or tunnel located by reference to some natural object or permanent monument, as will identify the same. All locations, whether of claims or tunnels, shall be recorded within twenty days after location, unless the locators shall hold the same by constant labor thereon; otherwise the ground shall be considered abandoned.

Art. 14th. On each claim located, not less than one hundred dollars worth of labor shall be performed or improvements made during each year, until a patent shall be issued therefor; a failure to comply with this requirement, shall be deemed equivalent to an abandonment of the claim, and render the same subject to re-location. On each tunnel there shall be performed each year, at least one hundred dollars worth of labor, and a failure to prosecute the

work for a period of six months, shall be considered as an abandonment of the right to all undiscovered veins or lodes on the line of said tunnel. All cases of dispute arising in regard to mining claims, shall be referred to a board of arbitration, consisting of five disinterested claim-holders, selected by the miners of the district, at a special meeting called for that purpose.

Art. 15th. Any person or persons shall have the right to locate, for mining purposes, any ledge, lode, or deposit, and work the same through and by means of a tunnel, and any work done on such tunnel claim, shall be considered as work done on the whole claim or location.

Art. 16th. No person shall be entitled to vote at any meeting of miners unless he owns a *bona fide* interest in a mining claim in this district.

Art. 17th. The by-laws of this district may be repealed, revised, or amended, at any meeting that may be duly called by fifty or more *bona fide* claim-holders in the district; and it shall require twenty-five *bona fide* claim-holders in the district, to constitute a quorum at such meeting.

111 Art. 18th. It shall be the duty of the recorder, previous to any meeting for a revision of the by-laws, to give at least ten days' notice of the same, by posting notice of said meeting in three conspicuous places in the district, and to publish said notice for at least five days in a daily newspaper published in Salt Lake county; it shall be his further duty, at the written request of not less than five *bona fide* claim-holders of the district, to issue a call for any special meeting, by giving at least five days' notice, and posting the same in three conspicuous places in the district, stating the time and place of meeting, and the object for which such meeting is called. At said meeting no business shall be transacted other than that specified and named in the call.

Art. 19th. All laws or parts of laws in this district, conflicting with these laws, or with any of the mining laws of the United States, are hereby repealed.

Art. 20th. These laws shall take effect and be in force from and after their passage.

TERRITORY OF UTAH, } ss.
COUNTY OF SALT LAKE. }

John McDonald, being duly sworn, deposes and says: That he is the mining recorder of Little Cottonwood Mining District, in the county of Salt Lake, in the Territory of Utah; that he has now in his possession and under his control, the mining records of the said mining district; that the above and foregoing is a full, true, and correct copy of the by-laws, rules, regulations, and customs, of the miners of said mining district, established and in force therein from the eighth (8th) day of June, A. D. one thousand eight hundred and seventy-two (1872), the same being the by-laws, rules, regulations, and cus-

toms, in force in said mining district, at the present time, as the same appears of record in the mining records of said mining district, now in my possession, and under my control, as aforesaid.

Witness my hand, this first (1st) day of December, A. D. 1873.

JOHN McDONALD, *Recorder.*

Subscribed and sworn to before me, this 1st day of December, A. D. 1873.

[SEAL.] J. A. VARNES, *Notary Public.*

112 (On cover:) All the by-laws of Mountain Lake Mining District. Exhibit "B," referred to on page 83 of printed transcripts. E. T. Sprague, clerk.

113 *By-Laws of Mountain Lake Mining District.*

At a meeting of the miners of Wasatch Mining District, held at Camp Douglas, U. T., July 20th, 1864, Mr. Wm. H. Farnham was called to the chair, and Charles H. Godbold appointed secretary.

The chairman stated that the object of the meeting was to create a new mining district within the limits of the Wasatch Mining District, elect a recorder, and establish by-laws for the government of said district.

A committee consisting of E. P. Woolworth, Wm. A. Bennett, and George Smith were appointed to draft by-laws.

The following laws having been presented by the committee, were acted upon *seriatim*, and adopted by the meeting.

Article I.

This district shall be known as the Mountain Lake Mining District, being a part of the Wasatch Mining District, to be bounded as follows: Beginning at the junction of Parley's creek with the Jordan river; thence up the right bank of said creek to the original eastern boundary line of the Wasatch Mining District; thence along said eastern boundary to the head of Utah lake; thence along the eastern margin of said lake to the head of the Jordan river; thence along the eastern bank of said river to the point of starting.

114 Article II.

The extent of a claim on any mineral vein shall be two hundred (200) feet along the lode with a width of five hundred (500) feet on each side of the lode, including all its dips, spurs, angles, depths, widths, offshoots, variations, and all the minerals therein contained; and priority of location shall determine the ownership of all cross or other leads traversing ground claimed under these laws; the discoverer and locator shall be entitled to one claim additional for discovery.

Article III.

No person shall hold more than one claim by location on any one vein; by purchase any number of claims may be held.

Article IV.

All claims shall be measured on a horizontal line, and numbered 1, 2, 3, etc., if from the discovery claim either way.

Article V.

Each company shall do one faithful day's work on their claim each month; on a failure to do so, such claim or claims will be subject to re-location; *Prorided, however*, That should the company be prevented from working by local insurrection or rebellion, their claims shall not be forfeited; *And procided, further*, That no claim belonging to a soldier, shall be subject to re-location until six months shall have elapsed after his discharge from the service of the United States unless he shall sign an agreement or articles of incorporation to the contrary.

Article VI.

Work done or caused to be done by the owner in any tunnel, cut, shaft, water ditch, or privilege, in good faith, for the benefit of any claim, shall be considered as done on the claim owned by said person or company.

Article VII.

All claims shall be recorded within ten days after a notice of location shall have been posted thereon, but a notice filed for record in the recorder's office shall be considered in all cases equivalent to a record.

115 Article VIII.

Claims on gold surface diggings shall be each two hundred (200) feet square.

Article IX.

Locators on veins of coal or iron shall be entitled to five hundred (500) feet for each locator, and five hundred (500) feet additional for discovery, and in all other respects shall be subject to and enjoy all the privileges and immunities of these laws.

Article X.

Whenever three hundred ($300) dollars shall have been expended upon the claims of any company in this district, the ground so claimed by said company shall be deemed as belonging in fee to the owners and their assigns, and the same shall not be subject to relocation by other parties ever after, except by an acknowledged abandonment of the ground by the company, which shall be so construed after said ground shall have laid idle for one year, and except in cases where claims are in litigation.

Article XI.

All voters at meetings to regulate mining interests shall be claim-owners in this district.

Article XII.

All meetings for the purpose of election or changing these laws must be called by posting written notices in at least three public places in the district, or by publishing the same in some newspaper printed in the territory, said publication to be made by the recorder in either case during at least twenty days previous to such meeting, stating the object thereof.

Article XIII.

There shall be a recorder chosen from among the miners of the district, who shall hold his office during a term of one year, unless a successor be duly elected, which can only be done by a majority of the legal voters present, at a meeting for that purpose; *Provided*, The recorder is called away, he has the power to appoint a deputy, until a new recorder may be chosen.

116 Article XIV.

He shall record all claims presented for that purpose, and be entitled to receive therefor a sum not exceeding one ($1.00) dollar for each separate claim or company; *Provided*, That it shall not be lawful for him to record any claim in conflict with a prior location; he shall endorse on all notices placed on file in his office the exact time of presentation for record; it shall be his duty (if required by the locator) to furnish each shareholder with a certificate of his claim attested by the seal of his office, for each of which he shall be entitled to receive the sum of fifty (50) cents; before recording any claim he shall satisfy himself that no rights are infringed.

Article XV.

The records of all claims located in this district, and heretofore recorded under the laws of the Wasatch District, thall be transcribed into the books of this district; but from the date of the adoption of these laws, such claims shall be subject thereto.

Article XVI.

The recorder shall keep two series of books, in one of which to record all locations, and in the other all transfers of claims in this district, to be styled Book A, B, &c., of Claims, and Book A, B, &c., of Transfers, in the latter of which he shall place on record all deeds of shares presented for that purpose, for which he shall be entitled to receive a sum not exceeding one dollar in each case. All such records, with the necessary revenue stamps affixed, shall be deemed legal evidence of sale or ownership as the case may be.

Article XVII.

All examinations of records shall be made in the presence of the recorder or his deputy; when relieved the recorder shall turn over to his successor all books and papers pertaining to his office; he

shall have a seal, and attest all acknowledgments and certificates made by him; *Provided*, That he may use his private seal until the proper seal of office shall be procured.

Article XVIII.

All records and copies thereof, properly certified, shall be legal evidence of their contents in all courts of this territory.

117 On motion, the district was declared established, and the by-laws as above were adopted.

On motion, E. P. Woolworth was unanimously elected recorder.

On motion, the chairman declared the meeting adjourned, *sine die*.

(Signed) WM. H. FARNHAM, *President*.

(Signed) CHARLES H. GODBOLD, *Secretary*.

I hereby certify the foregoing to be a true, full, and correct copy of the record now in my office, as found on the book of the Mountain Lake Mining District.

[SEAL.] EDWIN D. WOOLLEY,
Recorder Salt Lake County, Utah, and
Deputy Recorder of Mountain Lake Mining District.

December 11, 1875.

Mining Laws of Mountain Lake Mining District, Continued.

At a meeting of the claim-holders of Mountain Lake Mining District, held at Camp Douglas, U. T., May 29th, 1866, it was moved and seconded, and carried unanimously, that the by-laws, as amended, should be transcribed as follows:

Article I.

This district shall be known as the Mountain Lake Mining District, being a part of the Wasatch District, to be bounded as follows: Beginning at the junction of Parley's creek with the Jordan river; thence up the right bank of said creek to the original eastern boundary Wasatch Mining District; thence along said eastern boundary to the head of Utah lake; thence along said eastern margin of said lake to the head of the Jordan river; thence
118 along the eastern margin of said river to the point of starting.

Article II.

The extent of a claim on any mineral vein shall be two hundred feet along the lode, with a width of one hundred feet on either side, including all its dips, spurs, angles, depths, widths, offshoots, and variations, and all the mineral therein contained; and priority of location shall determine the ownership of all crosses or other leads traversing ground claimed under these laws; the discoverer and locator shall be entitled to one claim additional for discovery.

Article III.

All claims shall be measured on a horizontal line, and numbered 1, 2, 3, etc., from discovery claim either way.

Article IV.

If within six months after the adoption of this article, one day's work shall have been done on any one claim, or twelve days' work by any company on their lode in this mining district, or within six months after location of claims, the ground so claimed shall be deemed as belonging in fee, (except as against the United States), to the owners or their assigns forever, and the same shall not be subject to re-location.

Article V.

Work done or caused to be done by the owner in any tunnel, cut, shaft, water ditch, or privilege, in good faith, for the benefit of any claim, shall be considered as done on the claim owned by said person or company.

Article VI.

All claims shall be recorded within ten days after a notice of location shall have been posted thereon, but a notice filed for record in the recorder's office, shall be considered equivalent to a record.

Article VII.

Claims on gold surface diggings shall be each two hundred feet square.

119 Article VIII.

Locators on veins of coal or iron shall be entitled to 500 feet, and 500 feet additional for discovery.

Article IX.

No person shall hold more than one claim by location on any one vein or lode; by purchase any number of claims may be held.

Article X.

It shall be the duty of the recorder, upon satisfactory evidence being given that the required amount of work has been done, to issue certificate of real estate, upon application being made by the claim-holder or his attorney, with such evidence as he may deem satisfactory, and, further, it shall be the duty of the recorder to record such certificate on the record books of the district, when required.

Article XI.

All voters at meetings to regulate the mining laws of, shall be claim-holders of, the district.

Article XII.

All meetings for the purpose of election or changing these laws, must be called by posting written notices in at least three public

places in the district, or by publishing the same in a newspaper printed in this territory, said publication to be made by the recorder in either case during at least twenty days previous to such meeting, stating the object thereof.

Article XIII.

There shall be a recorder chosen from among the miners of the district, who shall hold his office during a term of one year, unless a successor be duly elected, which can only be done by a majority of the legal voters present, at a meeting for that purpose; *Provided*, The recorder is called away, he may appoint a deputy, until a new recorder may be chosen.

Article XIV.

He shall record all claims presented for that purpose, and be entitled to receive therefor a sum not exceeding one dollar for each separate claim or company; *Provided*, That it shall not be
120 lawful for him to record any claim in conflict with a prior location; he shall endorse on all notices placed on file in his office, the exact time of presentation for record; it shall be the duty, if required by the locator, to furnish each shareholder with a certificate of his claim attested by the seal of his office, for each of which he shall receive the sum of fifty cents; before recording any claim he shall satisfy himself that no rights are infringed.

Article XV.

The records of all claims located in this district, and heretofore recorded under the laws of the Wasatch Mining District, shall be transcribed into the books of this district; but from the adoption of these laws, such claims shall be subject thereto.

Article XVI.

The recorder shall keep two series of books, in one of which to record all claims, and in the other all transfers in this district, to be styled Books A, B, and C, of Transfers, and A, B, and C, of Claims, in the former of which he shall place on record all deeds of shares presented for that purpose, for which he shall be entitled to receive a sum not exceeding one dollar in each case. All such records, with the necessary revenue stamps affixed, shall be deemed legal evidence of sale or ownership as the case may be.

Article XVII.

All examinations of the records shall be made in the presence of the recorder or his deputy; when relieved the recorder shall turn all books and papers pertaining to his office to his successor; he shall have a seal, and attest all acknowledgments and certificates made by him; *Provided*, That he may use his private seal until the proper seal of office may be obtained.

Article XVIII.

All records and copies thereof, shall be legal evidence of their contents in all courts of this territory.

Article XIX.

Certificates of real estate issued by the recorder, shall be printed on durable paper, and the recorder shall receive for each the sum of one dollar.

121 I hereby certify the foregoing to be a true, full, and correct copy of the record now in my office, as found on the book of the Mountain Lake Mining District.

[SEAL.] EDWIN D. WOOLLEY,

Recorder Salt Lake County, Utah, and Deputy Recorder of Mountain Lake Mining District.

December 11, 1875.

Mining Laws of Mountain Lake Mining District, as amended at a miners' meeting, held in Little Cottonwood canyon, August 30th, 1869, pursuant to 20 days' notice given by the recorder.

Article I.—Boundaries.

This district shall be known as the Mountain Lake Mining District, and will be bounded as follows: Commencing at the "Hot Springs," near Salt Lake City; thence east to the crest of the Wasatch range of mountains; thence south along said crest to the south line of Salt Lake county; thence west along said county line to the river Jordan; then along the east bank of said river to a point directly west of said Hot Springs; then east to the place of beginning.

Article II.

The extent of a claim on any mineral vein shall be two hundred feet along the lode, with a width of one hundred feet on either side, including all dips, spurs, depths, widths, offshoots, and variations, and all the mineral therein contained; and priority of location shall determine the ownership of all crosses or other lodes traversing ground claimed under these laws; the discoverer and locator shall be entitled to one claim additional for discovery.

Article III.

All claims shall be measured in a horizontal line, and
122 numbered 1, 2, 3, etc., from discovery claim either way, or taken in company, to any amount not exceeding three thousand feet in length of any vein or lode.

Article IV.

If, within three months after this meeting, any claim-holder shall do three days' work on his claim or lode, such claim shall be held good, and thereafter they shall do three days' work every year, until

they shall have performed all the work necessary to obtain a patent from the U. S. government. Any claim-holder failing to comply with this article, their claims shall be subject to re-location, except such claims as have been worked upon, and for which certificates have been given. On motion, six dollars per day was declared to be the standard of each day's work.

Article V.

Work done or caused to be done on any tunnel, cut, shaft, water ditch, or privilege, in good faith, for the benefit of any claim, shall be considered as done on the claim owned by such person or company.

Article VI.

All claims shall be recorded within ten days after a notice of location shall have been posted thereon, but a notice filed with the recorder shall be considered equivalent to a record.

Article VII.

Claims on gold surface diggings shall be each two hundred feet square.

Article VIII.

Locators on veins of coal or iron shall be entitled to 500 feet square, and 500 feet additional for discovery.

Article IX.

No person shall hold more than one claim on any one lode vein by location; by purchase any number of claims may be held.

Article X.

It shall be the duty of the recorder, upon satisfactory evidence being given that the required amount of work has been done, to issue certificates of real estate, upon application being made by the claim-holder or his attorney, with such evidence as he may
123 deem satisfactory, and, further, it shall be the duty of the recorder to record such certificates on the record-books of the district when required.

Article XI.

All voters at meetings to regulate mining laws, shall be claim-holders in the district.

Article XII.

All meetings for the purpose of election or changing these laws, must be called by posting written notices in at least three public places in the district, and by publishing the same in a newspaper in the district, said publication to be made in either case by the recorder during at least twenty days previous to such meeting, stating the object thereof.

Article XIII.

There shall be a recorder chosen from among the miners of the district, who shall hold his office during a term of one year, or until his successor shall be duly elected, which can only be done by a majority of the legal voters present at a meeting for that purpose; *Provided*, The recorder is called away, he has the power to appoint a deputy, until a new recorder may be chosen.

Article XIV.

He shall record all claims presented for that purpose, and be entitled to receive therefor a sum not exceeding one dollar for each claim or company; *Provided*, That it shall not be lawful for him to record any claim in conflict with a prior location; he shall endorse on all notices placed on file in his office, the exact time of presentation for record; it shall be his duty, if required by the locator, to furnish each shareholder with a certificate of his claim, attested by the seal of his office, for each of which he shall receive the sum of fifty cents; before recording a claim he shall satisfy himself that no rights are infringed.

Article XV.

The records of all claims located in this district, and heretofore recorded under the laws of the Wasatch Mining District, shall be transcribed into the books of this district; but from the date of the adoption of such laws, such claims shall be subject thereto.

124 Article XVI.

The recorder shall keep two series of books, in one of which to record all locations, and in the other all transfers, to be styled Book A, B, and C, of Claims, and Book A, B, and C, of Transfers, in the latter of which he shall place on record all deeds of shares presented for that purpose, for which he shall receive the sum of one dollar for each. All such records, with the necessary stamp affixed, shall be deemed legal evidence of sale or ownership, as the case may be.

Article XVII.

All examinations of records shall be made in the presence of the recorder or his deputy; when relieved the recorder shall turn over all books and papers to his successor.

Article XVIII.

All records and copies thereof, shall be legal evidence of their contents in all courts in this territory.

Article XIX.

Certificates of real estate issued by the recorder, shall be printed on durable paper, and the recorder shall receive for each the sum of one dollar.

On motion, Article 20 was added to the by-laws, which is as follows:

Article XX.

Provided any number of miners not less than six think it necessary to call a special meeting, the recorder may call such meeting by giving four days' notice, to transact any or all business not mentioned in Article 12. Notice of which shall be posted in four public places in the district.

On motion, all claims located prior to this date that have not been worked upon according to law, are subject to re-location.

On motion, James Wall was re-elected recorder for the ensuing year.

On motion, meeting adjourned *sine die*.

(Signed) JOSEPH S. WING, *Chairmon.*
C. L. HAINES, *Secretary.*
JAMES WALL, *Recorder.*

August 30, 1869, Little Cottonwood Canon.

125 *Names of miners present at said meeting.*

O. P. Rockwell,	Isador Morris,	Oren Rockwell,
H. P. Kimball,	J. Fletcher,	G. Von Schoonhover,
Thos. Jenkins,	Jackson Jones,	Geo. Wood,
Chas. Crismon,	William Reed,	S. D. Sirrine,
Thos. Showell,	J. Eddins,	E. Rogers,
Jas. Lawson,	H. C. Lincoln,	Albert Reis,
H. J. Faust,	Thos. Williams,	A. Tarbet,
W. H. Rager,	John J. Greene,	J. Bernard,
W. D. Fuller,	B. F. Dewey,	R. Gill,
B. Redell,	Jas. Lawrence,	E. Chambers.
Ed. Lavalle,		

I hereby certify that the foregoing is a true and correct copy of the by-laws of the Mountain Lake Mining District, as recorded in the mining records of said Mountain Lake Mining District, with the amendments thereto.

Salt Lake City, Oct. 25th, 1870.

JAMES WALL, *Recorder.*

I hereby certify the foregoing to be a true, full and correct copy of the record now in my office, as found on the book of the Mountain Lake Mining District.

[SEAL.] EDWIN D. WOOLLEY,
Recorder Salt Lake County, Utah, and
Deputy Recorder of Mountain Lake Mining District.

December 11, 1875.

[Here follows map, marked page 125.]

126 Afterwards, at a term of said Supreme Court of Utah Territory, begun and held at Salt Lake City, in said territory, on the 14th day of January, A. D. 1878, proceedings were had in said court and said cause and entered on the records of said court, as follows, to wit:

THURSDAY, *January 24th*, A. D. 1878.

A session of the Supreme Court of Utah Territory was held this day, beginning at ten o'clock A. M.

Present, all the justices, the clerk, marshal, and members of the bar. * *

HELEN TARBET, ASSIGNEE OF ALEX. TARBET, Respondent,
vs.
THE FLAGSTAFF SILVER MINING COMPANY OF Utah (limited), Appellant. } From 3d Dist.

This cause coming on regularly for hearing, was argued by J. R. McBride, esq., for appellant.

127 MONDAY, *January 28th*, A. D. 1878.

A session of the Supreme Court of the Territory of Utah was held this day, beginning at ten o'clock A. M. Present, all the justices, the clerk, marshal, and members of the bar. Court was duly opened. * *

HELEN TARBET, ASSIGNEE OF ALEX. TARBET, Respondent,
vs.
THE FLAGSTAFF SILVER MINING COMPANY OF Utah (limited), Appellant. } From 3d Dist.

This cause was further argued by C. W. Bennett, esq., for respondent.

TUESDAY, *January 29th*, A. D. 1878.

A session of the Supreme Court of the Territory of Utah was held this day, beginning at ten o'clock A. M. Present, all the justices, the clerk, marshal, and members of the bar. Court was duly opened. * *

HELEN TARBET, ASSIGNEE OF ALEX. TARBET, Respondent,
vs.
THE FLAGSTAFF SILVER MINING COMPANY OF Utah (limited), Appellant. } From 3d Dist.

128 This cause was further argued by J. R. McBride, esq., for appellant, submitted and taken under advisement by the court.

And afterwards, at a term of said Supreme Court of Utah Territory, begun and held at Salt Lake City, in said territory, on the 3d day of June, A. D. 1878, proceedings were had in said court and said cause and entered on the records of said court, as follows, to wit:

Regular June term, A. D. 1878.

MONDAY, *June* 3*d*, A. D. 1878.

A session of the Supreme Court of the Territory of Utah was held this day, beginning at one o'clock P. M., pursuant to the proclamation of the governor of said territory.

Present and presiding—

Hon. Michael Schaeffer, chief justice.

Also, Hon. Philip H. Emerson, associate justice, and Hon. Jacob S. Bereman, associate justice; E. T. Sprague, clerk; S. L. Sprague, deputy U. S. marshal, and members of the bar. The court was duly opened by proclamation.

* * * *

129 HELEN TARBET, ASSIGNEE OF ALEX. Tarbet, Respondent,
vs.
THE FLAGSTAFF SILVER MINING COMPANY OF Utah (limited), Appellant. } From 3d Dist.

This cause having been argued, submitted, and taken under advisement at the last term of this court, and the court being now sufficiently advised thereupon, it is now here ordered and adjudged that the judgment of the district court in said cause be, and the same is hereby, affirmed with costs, to which ruling and decision the appellant then and there excepted, and such exception was allowed.

130 Afterwards, on the 13th day of September, A. D. 1878, was issued a writ of error to remove said cause to the Supreme Court of the United States, of which a copy was immediately thereafter lodged with said clerk of said Supreme Court of Utah Territory, and the original of which follows, to wit:

131 UNITED STATES OF AMERICA, } *ss.*
TERRITORY OF UTAH. }

The President of the United States of America to the honorable the judges of the Supreme Court of the Territory of Utah, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, between Helen Tarbet, plaintiff, and the Flagstaff Silver Mining Company of Utah (limited), defendant, a manifest error hath hap-

pened, to the great damage of the said plaintiff in the said cause, as by complaint appears. We being willing that error, if any hath been should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 4th Monday of October next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, shall be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at Salt Lake, in said Territory of Utah, this 13th day of September, 1878.

E. T. SPRAGUE,

[SEAL.] *Clerk of Supreme Court of Utah Territory.*

132 TERRITORY OF UTAH, } ss.
COUNTY OF SALT LAKE. }

I, E. T. Sprague, clerk of the Supreme Court of the Territory of Utah, in obedience to the writ of error hereto attached, herewith return to the Supreme Court of the United States a transcript of the record and proceedings, in and of, the said Supreme Court of Utah Territory, in the cause in said writ mentioned, and I hereby certify that said transcript is a true, full, and complete copy of the originals thereof on file or of record in my office.

In witness whereof, I have hereunto set my hand and the seal of said Supreme Court of Utah Territory, at Salt Lake City, this 19th day of October, A. D. 1878.

E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

133 In the United States Supreme Court.

THE FLAGSTAFF SILVER MINING CO. OF UTAH (limited), Plaintiff in Error,
v.
HELEN TARBET.

It is hereby stipulated that the clerk of this court may amend and correct the writ of error in this case, by causing the same to show that the Flagstaff Silver Mining Company of Utah (limited), is the plaintiff in error and Helen Tarbet is defendant in error.

J. M. WOOLWORTH,
Attorneys and of Counsel for Plaintiff in Error.
BENNETT & HARKNESS,
Attys. for Deft. in Error.

Endorsed: Sup. Court U. S., 1878, Octo. term, No. 998.
134 The Flagstaff Silver Mining Co. of Utah, &c., vs. Helen Tarbet. Stipulation amending writ of error. Filed 29th November, 1878.

(Endorsed on cover:) Utah Terry. Sup. Court. No. 998. Helen Tarbet, defendant in error, vs. The Flagstaff Silver Mining Company of Utah (limited), plaintiff in error. Filed 29th November, 1878. '78, Nov. 29. Stipulation to correct writ of error as to title of cause filed.

SUPREME COURT OF THE UNITED STATES.

THE FLAGSTAFF SILVER MINING COMPANY OF UTAH (LIMITED) PLAINTIFF IN ERROR,

v.

HELEN TARBET.

BRIEF FOR PLAINTIFF IN ERROR.

J. M. WOOLWORTH,

OF COUNSEL FOR PLAINTIFF IN ERROR.

C. W. GRAY, PRINTER, OMAHA.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE FLAGSTAFF SILVER MINING COMPANY OF UTAH, (LIMITED) PLAINTIFF IN ERROR,

v.

HELEN TARBET.

BRIEF AND ARGUMENT FOR THE PLAINTIFF IN ERROR.

This is a writ of Error to the Supreme Court of the Territory of Utah. It was in an action in the nature of trespass *quare clausum fregit*, brought by Alexander Tarbet against the Plaintiff in Error, in the District Court of that Territory, for the Third District, and the County of Salt Lake. Afterwards, by an order of the Court, the Defendant in Error was substituted for the original Plaintiff. Irwin Davis, J. N. H. Patrick, Matthewson T. Patrick, and George Cullens were impleaded as defendants, but, as against them, the action was dismissed, and proceeded against the Plaintiff in Error as the sole defendant. Equitable relief by way of injunction was prayed, but that part of the complaint does not need attention. In October, 1877, the action was tried to a jury and resulted in a verdict and judgment in favor of Helen Tarbet against the Flagstaff Company for $45,000. The Company carried the case to the Supreme Court of the Territory, when the judgment was affirmed.

The facts material to the question which is here presented, are as follows:

On the 19th of March, 1870, ten persons located 2,600 feet on the vein or lode known as "The Flagstaff," and their several claims were to be held undivided, and to be

worked in company. Number five, north of the discovery, alone excepted. The notice of location was on the 25th of the same month duly recorded. These claims came to the Salt Lake Mining Company, and that Company conveyed to this Plaintiff in Error. On the 18th of September, the Salt Lake Company entered the claim in the United States Land Office at Salt Lake; and, on the 22d of March, 1872, a patent issued to it. The notice of location, the deed from the Salt Lake Company to the Flagstaff Company, and the patent are respectively marked No. 1, No. 3, and No. 4, of the defendant's exhibits.

The patent conveyed the claim "embracing twenty-six hundred feet of the Flagstaff lode, bearing silver, with surface ground as hereinafter described, for the convenient working of the mine." This surface ground is minutely described in the patent, and appears upon the map which is in the record. It is a piece of land one hundred feet wide, twenty-six hundred feet long, and runs nearly north and south.

At a day which does not appear, locations were made on what was called the Titus lode; No. 1, of 200 feet, being held by one Axten, who conveyed to Alexander Tarbet. In January, 1872, Tarbet and one Lee, re-located Nos. 2 and 3. Tarbet also bought from Ivins, ten feet off the west end of the South Star, which adjoined the Titus on the east. Others were interested with him in these claims, but their relations to the property and to him, and the mode of conducting the works, are not material. He held a five-eighths interest in the South Star and Titus Mine, with surface ground, two hundred feet wide north and south, and seven hundred feet long east and west. It is admitted that these claims were located after the Flagstaff.

No patent has ever been issued for this property.

In the prosecution of its work, the Plaintiff in Error has gone beyond the side-lines of its surface ground, and in December, 1875, its second level being extended some

300 feet, it broke into the works of Tarbet. He, on the other hand, had extended his works northwesterly from his discovery and working shaft, being at the time of the collision, some 100 feet north of his north-side line. It is admitted on both sides that the two locations and works are on the same lode. Tarbet's contention is that the Flagstaff Company is limited to the side-lines of its surface ground, and that all the ore which it has extracted east of that line, has been taken from his mine; and he sues to recover his damages for the trespass.

The Court, among other things, instructed the jury that, "The defendant has not shown any title or color of title to any part of the vein except so much of its length on the course as lies within the Flagstaff surface and the dip of the vein for that length, and it has shown no title or color of title to any of the surface of the South Star and Titus Mining Claim except to so much of No. 3 as lies within the patented surface of the Flagstaff Mining Claim.

The defendant below requested the Court to instruct the jury as follows:

"FOURTH.—By the act of Congress July 26, 1866, under which all these locations are claimed to have been made, it was the vein or lode of mineral that was located and claimed: the lode was the principal thing and the surface area was a mere incident for the convenient working of the lode; the patent granted the lode as such, irrespective of the surface, and which an applicant was not bound to claim; it was his convenience for working the lode that controlled his location of the surface area, and the patentee, under that Act, takes a fee simple title to the lode to the full extent located and claimed under said Act.

"FIFTH.—In the very nature of the thing, a lode or vein in its unworked and undeveloped state, cannot be known and surveyed so as to plat it and make a diagram of it; the law does not require impossibilities, and must receive

a reasonable construction. The diagram required to be filed by the applicant for a patent under the Act of 1866, was a diagram of the surface and area claimed, and this diagram might be extended laterally or otherwise as convenience in working this claim might suggest to the applicant.

"SIXTH.—The patent under which the defendant claims conveyed to the Salt Lake Mining Company, the defendant's grantor, the premises mentioned and described therein.

It was issued under the mining law of the United States, passed July, 1866, and, in terms, granted to the Salt Lake Mining Company, its successors and assigns, the surface ground described in said patent, and the same described in the plaintiff's complaint with the right to follow the Flagstaff lode or vein to the distance of 2,600 linear feet, with its dips, angles and variations to any depth, although it may enter the land adjoining. The surface ground under said Act of 1866, is granted and intended solely for the convenient working of the mine, and does not measure the grantees right to the vein or lode in its course, or control the direction which he shall take.

"NINETEENTH.—If you find that the Flagstaff lode was regularly located, and worked under the mining law, and patented to the grantee regularly, (and the patent is conclusive evidence of these facts), "the owners of such lode have the right to the lode located for the length and distance claimed in the location notice, though the lode runs in a different direction from that in which it was supposed to run when discovered and located."

ASSIGNMENT OF ERROR.

The Plaintiff in Error assigns for error the charge of the Court and the refusal to give its requests, that is, that the Judge instructed the jury that the defendant below had

shown no title or color of title to any part of the vein except so much of its length on its course as lies within the surface ground patented; and that he refused to direct the jury, that by the act of Congress it was the vein or lode of mineral that was located and claimed, and that the patent granted the lode irrespective of the surface area which was merely for the convenience of working the lode; that the diagram required to be filed by an applicant, for a patent was of the surface claimed, and might be extended laterally or otherwise, as convenience in working the claim might suggest, that the surface ground patented does not measure the grantee's right to the vein or lode in its course, or control the direction which he shall take; and, lastly, that the Flagstaff Company have the right to the lode for the length thereof claimed in the location notice, though it runs in a different direction from that in which it was supposed to run at the time of the location.

The act of Congress applicable to the case, is that of July 26, 1866, (14 U. S. Stat. at large, 251), and is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,

That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts so far as the same may not be in conflict with the laws of the United States.

SECTION 2. And be it further enacted, That whenever any person, or association of persons, claims a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar or copper, having previously occupied and im-

proved the same according to the local customs or rules of miners in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant or association of claimants, to file in the local land office a diagram of the same so extended laterally or otherwise, as to conform to the local laws, customs and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode ith its dips, angles and variations, to any depth, althou , it may enter the land adjoining, which land adjoining shall be sold subject to this condition.

SEC. 3. And be it further enacted, That upon the filing of the diagram as provided in the second section of this act and posting the same in a conspicious place on the claim, together with a notice of intention to apply for a patent, the Register of the Land Office shall publish a notice of the same in a newspaper, published nearest to the location of said claim, and shall also post such notice in his office for the period of ninety days, and after the expiration of such period, if no adverse claim shall have been filed, it shall be the duty of the Surveyor General, upon application of the party, to survey the premises and make a plat thereof, indorsed with his approval, designating the number and description of the location, the value of the labor and improvements, and the character of the vein exposed; and upon the payment to the proper officers of five dollars per acre, together with the cost of such survey, plat and notice, and giving satisfactory evidence that said diagram and notice has been posted on the claim during said period of ninety days, the Register of the Land Office shall transmit to the General Land Office said plat, survey and description, and a patent shall issue for the same thereupon. But said plat, survey, or description, shall in no

case cover more than one vein or lode, and no patent shall issue for more than one vein or lode which shall be expressed in the patent issued.

SEC. 4. And be it further enacted, That when such location and entry of a mine shall be upon unserveyed lands it shall, and may be lawful, after the extension thereto of the public surveys, to adjust the surveys to the limits of the premises, according to the location and possession of the plat aforesaid, and the Surveyor General may, in extending the surveys, vary the same from a rectangular form to suit the circumstances of the country and the local rules, laws, and customs of miners; Provided, that no location hereafter made shall exceed two hundred feet in length along the vein, for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein to any depth with all its dips, variations, and angles, together with a reasonable quantity of surface for the convenient working of the same as fixed by local rules; And provided further, that no person may make more than one location on the same lode, and not more than three thousand feet shall be taken in any one claim by any association of persons.

The local laws of the Little Cottonwood Mining District are set out in the record. Those applicable to this case are the set adopted in September, 1869, and were in force from that time to June 2d, 1870, during which period the claim was located. The articles necessary to be considered are:

ARTICLE 12. No person or company of persons shall be entitled to hold more than two hundred (200) feet as discovery of a lode, nor more than two hundred feet for each person located, and the number of feet in all shall not exceed three thousand (3000) feet. The surface width requisite for mining and milling purposes or for the convenient working of the same shall not exceed fifty (50) feet on each side of the walls of said vein or lode.

ART. 13. All claims shall be recorded within twenty days after location, and a blazed tree, stake or board shall designate the name of lode and the amount of ground claimed by the locators of the ledge unless the parties shall hold the same by constant labor thereon.

THE QUESTION STATED.

The act of Congress of 1866, in its second section gives the right to follow the vein or lode although it may enter the land adjoining.

But it is not claimed by the Plaintiff in Error that this gives the right to follow the vein on its length beyond the end lines of the claim. Although there is no disagreement between the parties on this point, a brief explanation of what is meant by end-lines, may assist those who are not familiar with the subject, in understanding the nature of the question raised on this record.

A person who discovers a vein or lode of mineral on the public lands, is not permitted to claim it for its whole length; he has always and in all mining countries been permitted to claim only a limited number of feet in length, along the vein, or lode, or ledge. Prior to the act of Congress of 1866, this limit was fixed "by the local laws, customs, and rules of the miners in the several mining districts." To permit a party to follow his vein or lode beyond the limits fixed into adjoining lands, would defeat the law whether local or congressional, prescribing the limit. In this case neither party is extending his workings beyond the distance from his discovery limited by the local customs. So that the question of "end-lines" does not arise.

On the other hand the Defendant in Error does not claim that, under no circumstances, can the patentee follow his vein beyond the side-lines of his surface-ground. She is understood to insist that the right to do so is limited to cases where the vein in its descent, by its dips or angles or variations, extends into adjoining lands, and

does not extend to cases where the vein in its "strike," in mining nomenclature, that is, in its general course and direction, runs beyond the side lines.

It is admitted that the vein in this case belongs to the latter class. The larger part of so much of the workings of the Plaintiff in Error, as are shown on the map, are east of the east line of the surface-ground patented, and the point of contact thereof with the workings of Tarbet, designated on the map by the letters K J and H, is, as has been said, distant from said east line some 300 feet.

The question, then, is whether the patentee may follow his vein or lode into adjoining land when it extends into the same on its strike, within the distance from the discovery limited by the local laws, customs and rules of the miners of the district or by the act of Congress, whichever is properly applicable to the case.

FIRST POINT.

A consideration of the relation of the "surface," that is, the land which is claimed under the local laws and granted by the act of Congress, to the "lode or vein," of the purposes for which this surface is claimed by the miner, and granted to him by the patent, and its extent, strongly support our view that its side-lines do not limit the right to follow the vein on its strike.

1. A marked distinction is taken in the local laws of the Little Cottonwood and other mining districts, between "the lode or vein" and "the surface."

The 12th article provides, firstly, that "no person or company of persons shall be entitled to hold more than two hundred feet as discovery of a lode, nor more than two hundred feet for each person located, and the number of feet in all shall not exceed three thousand feet."

This provision relates to the vein or lode, and was designed to limit the length on and along the vein or lode

which the miner was permitted to claim, locate and hold. It said, in substance, that the miner might have so many feet on the vein or lode taken on its length and on its course; and it is expressed in the negative, because, from immemorial usage, that was the mode in which the miners claimed, located and held their properties, and a limitation was necessary to prevent the taking of a whole vein or lode however long it might be. Not only does this appear from the language, of the article but it is clearly stated by Mr. Justice Field, who speaks from extended and minute acquaintance with the subject, in his very luminous opinion in the Eureka case: (4 Sawyer, 302, 322), where he says: "What the miners meant by allowing a certain number of feet on a ledge, was that each locator might follow his vein for that distance, on the course of the ledge, to any depth within that distance."

Then, secondly, the article provides that "the surface width requisite for mining and milling purposes, or for the convenient working of the same, shall not exceed fifty feet on each side of the walls of said vein or lode." Here "surface" is provided for—and that, as a thing separate and distinct from the other. The article thus provides for,

1. A certain number of feet on the lode, and

2. A certain amount of surface for milling or mining purposes or for the convenient working of the mine.

From the opinion of Mr. Justice Field in the Eureka case, (4 Sawyer, 301, 321, 322,) it appears that the same rule existed in the Eureka mining district in Nevada. He there says:

"The rules of the miners in the Eureka Mining District adopted in 1865—laws of the district as they are termed by the miners—provided that claims of mining ground should be made by posting a written notice on the claimant's ledge, defining its boundaries if possible; that each claim should

consist of two hundred feet on the ledge, but claimants might consolidate their claims by locating in a common name, it, in the aggregate, no more ground was claimed than two hundred feet for each name, and that each locator should be entitled to all the dips, spurs, and angles connecting with his ledge; and that a record of all claims should be made within ten days from the date of location. The rules also allowed claimants to hold one hundred feet each side of their ledge, for mining and building purposes, but declared that they should not be entitled to any other ledge within this surface."

And it may be stated without fear of contradiction that this rule obtains generally and is similarly expressed in all other mining districts in the gold and silver bearing regions of the country.

The distinction between the length along the vein which the claimant might take, and the surface ground, is very clearly observed in the patent in this case. In the recitals it is said that the company entered the claim embracing, first, "twenty-six hundred (2600) linear feet of the Flagstaff lode bearing silver;" and secondly, "with surface ground as hereinafter described for the convenient working of the mine." In the granting part of the patent this mineral claim is conveyed, and it is described as "lot 38, forming a portion of the unsurveyed public domain, with the right to follow said Flagstaff vein twenty-six hundred (2600) linear feet." In the conditions therein expressed, subject to which the grant is made, it is provided "that the grant hereby made is restricted to" first, "one vein or lode," and secondly, the grant is "with surface ground as hereinbefore described designated lot No. 38, forming a portion of the unsurveyed public domain to-wit, to the aforesaid Flagstaff vein or lode." And then to distinguish the particular vein or lode which is granted from any other vein or lode which may be within the surface ground, these descriptive words are added, "upon which the required

amount has been expended in labor and improvements;" and then follows the exception of any other vein or lode within the above described premises.

In these clauses we have separately mentioned and granted the twenty-six hundred linear feet of the lode and the surface ground, as if the grant of the one was insufficient to convey the other.

From this brief view of the local laws and the patent, we pass to a consideration of the act of Congress of 1866.

In section four, the provision in respect of length on the lode is much the same as in the local laws above quoted.

"No location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode with the right to follow such vein to any depth with all its dips, variations and angles." There the lode or vein is provided for. Then follows the provision about the surface ground, as another, separate and distinct thing, in these words: "Together with a reasonable quantity of surface for the convenient working of the same, as fixed by local laws."

Again, in the last clause of section three, it is provided that the "said plat, survey or description shall in no case cover more than one vein or lode, and no patent shall issue for more than one vein or lode which shall be expressed in the patent issued."

By this clause, a limitation is put upon the grant of the surface, so that but one lode or vein within it passes, just as in the other clause, a limitation is put upon the grant of that lode, so that but a certain number of linear feet passes. The intention of Congress clearly was to grant first, one lode for a certain distance, and second, sufficient surface to work with.

Other clauses of the act support this view of the distinction of these two separate matters, the lode and the surface, but an examination of them in this immediate con-

nection would involve, in order to fully appreciate them, a somewhat extended explanation, which can be more usefully made hereafter. The two here adverted to are quite sufficient for our present purpose; namely, to show that in the act, as in the local laws and the patent, there is a marked distinction between the vein and the surface.

2. The object of claiming and holding the surface is for convenience in working the mine, and not to define the vein on the ground.

In the local laws of the Little Cottonwood district this is distinctly stated: "The surface width requisite for mining or milling purposes, or for the convenient working of the same," is the language.

From the extract given above, from Mr. Justice Field's opinion, it appears that the rule was the same in the Eureka District.

And in the act of 1866 the expression is much the same. It is, "a reasonable quantity of surface for the convenient working of the same, as fixed by local laws." This is the only purpose for which the surface is granted; and the expression of it negatives the idea that the further purpose was in view, of defining by measurement or lines or stakes on the ground, the course or strike of the vein, or what the locator was to take on its cause or strike.

3. And the extent of surface which may be taken is limited; only what is necessary for the purpose of mining or milling, or the convenient working of the vein or lode, can be taken. The local law does not provide that a surface width of fifty feet on each side of the walls of the vein shall be taken, but that not more than that shall be taken. In the particular instance of this vein, which is 300 feet wide, fifty feet on each side of the walls would give four hundred feet surface. This may be much more than is necessary for the purposes for which alone surface may be taken; in which case the miner would not desire nor be permitted to take so much. Indeed it is not necessary that

any surface should be taken. If not required for the convenient working of the vein there is no reason or authority for taking any at all; and as only one vein or lode within the surface ground can be taken, and as the locator of another vein or lode which extends into this same surface may follow it therein, there is manifest propriety and indeed necessity in confining the area to the purposes specified.

4. Neither the local laws nor the statute prescribe the form of the surface or its position relative to the vein. It need not be on both sides of the walls; it may be taken only on one side; it need not be in a parallelogram; it may be ever so irregular in shape; above all, it need not extend along the whole line of the vein. In fact, such useless extension of it is forbidden in the vast majority of cases; for in hardly any case is a mine worked on the surface of the ground for any considerable distance from the shaft or mouth of the tunnel, and but a comparatively limited area near the shaft or mouth is sufficient for all works, buildings and ways which are in the open air. And this limited area is not and cannot usefully be drawn out, for a considerable distance along the vein; if it were, a "quantity of surface," much more than "requisite," much more than "reasonable," "for the convenient working of the vein" would be secured to the injury of other parties.

In the opinion already cited, Judge Field says: "It is true, as stated by the defendants, that the surface land taken up in connection with a linear location on the ledge or lode is under the act of 1866, intended solely for the convenient working of the mine, and does not measure the miner's right either to the linear feet on its course or to follow the dips, angles and variations of the vein or control the direction he shall take."

So that the act and the local laws not only do not require that the surface ground shall extend along the vein so as to cover it on its whole length, but, on the other

hand, by prescribing the purpose for which it may be taken, which is very different from that of covering the vein, and by limiting its extent to the purpose for which it is taken they impliedly, nay, absolutely forbid that it shall be thus needlessly extended.

When, then, it is considered that under the local laws and under the act of Congress, the vein or lode is one thing and the surface is another, that the special purpose for which the surface may be taken is quite different from covering the lode, and the limit fixed for its extent does not permit so great an area as is necessary to do so, and its form and position relative to the lode is not prescribed, the conclusion is necessary that its side-lines do not measure the right to follow the vein into adjoining lands, in whatever form it enters the same.

SECOND POINT.

A consideration of what a diagram is to be made, which the claimant is to file in the local land office, conducts to the same result. And what has already been said of the distinction between the vein or lode and the surface is of assistance in resolving this question; for it is, whether the diagram is to be of the vein or lode, or of the surface ground, or of both.

The second section of the act provides that "whenever any person or association of persons claims a vein or lode of quartz, etc., bearing gold," etc., having done certain things, "it shall and may be lawful for such claimant to file a diagram of the same, so extended latterally or otherwise, as to conform to the local laws, customs and rules of miners, and enter such tract and receive a patent therefor, granting such mine."

The words "diagram of the same," grammatically refers to the words "vein or lode." The language is "whenever any person * * claims a vein or lode * * it shall and may be lawful for such claimant *

* to file in the local land office a diagram of the same." Were this all, it would be manifest that the diagram is to be of the vein or lode. But the words are added, "so extended latterally or otherwise, as to conform to the local laws," etc.

A brief consideration of these words will show that the sentence cannot be read according to its grammatical structure.

It is necessary, in order to an understanding of the clause, to ascertain two matters: one, what is the thing which is to be extended; the other, in relation to what is that thing to be extended. It is very easy to determine the latter, and that being done, it will be equally easy to determine the former.

When a miner discovers a vein of mineral, and is to make a location of it, the vein, and the vein alone, is the thing to which whatever he does relates. He designates its name; he advertises it by posting his notice; he selects his surface ground with reference to it, and the convenient working of it. That vein is the one thing which has position, place, definitive, positive location. When, then, it is said that he shall make a diagram, extended with reference to something not named, the vein or lode must, of necessity, be what is meant; nothing else can be meant—there is nothing else to be meant. Then the words run thus: "A diagram of the same so extended latterally to the vein or lode, or otherwise with reference thereto, as to conform to local laws."

It thus clearly appearing that it is the vein or lode with reference to which the thing, whatever it is, is to be extended, we come to consider what that thing is. That thing, whatever it is, is to be extended "latterally," that is, along side of the vein or lode—or "otherwise," that is, across the vein or lode at right angles, or obliquely at obtuse angles, or in any other way that may be conceived of. If the word "same" in the section means the vein or lode,

the reading would be thus: Whenever any person * * claims a vein or lode and has done certain things, it shall and may be lawful for said claimant * * to file in the local land office a diagram of the same 'vein or lode' so extended laterally, that is, along side of the said vein or lode, 'or otherwise,' as for instance, across the said vein or lode, 'as to conform to local laws.' The absurdity then is manifest, for it requires that the vein be extended along side of or across itself.

If it be said that the word "extended" applies to and qualifies the word "diagram," the absurdity is none the less apparent. A diagram is an "explanatory sketch—a drawing for illustration." (Worcester.) In this connection it means a delineation, or drawing on paper or other plain substance. If a diagram of the vein or lode is what is meant, the clause reads thus: A drawing of the vein or lode extended latterally, that is, along side of the vein or lode, or across it at right angles, or obliquely. It is possible to conceive of a diagram showing the vein or lode, that is, tracing its course and including ground on each side, or on either side of it for a certain distance. Such a diagram would be of value, if it were possible to make one; and such a diagram might be what is meant if the word "latterally" alone were used. But it is not possible to conceive of a diagram of the vein or lode, which runs "otherwise" than "latterally," or along side of the vein. It could not possibly run across the vein. And no construction is permissible which does not satisfy the requirements of that as well as the other case.

If the intention of Congress were to require simply a diagram of the vein, that is, a drawing, showing the course of the vein, it would be wholly unnecessary to say anything about its extension in any direction.

Another reason against referring the word "same" to "vein or lode," that is, reading the section so as to require the claimant to file and post a diagram showing the course

of the vein or lode is the impracticability in most cases of making such a diagram. Many veins or lodes are wholly under ground; there are no indications of their existence on the surface. This is a matter of common knowledge. So, too, there are veins or lodes with outcroppings so indistinct that their course or strike cannot be traced on the surface. Such seems to be the character of the Flagstaff. Cullens swears that there were no outcrops between the discovery shaft and the place where Tarbet laid his claim, and Tarbet shows that he did not know that the two discoveries were on one lode.

A miner, however experienced, standing at the point of his discovery of either of these two classes, could have no information from which to form a reliable judgment as to the strike of the vein. Whatever indications there might be would be very uncertain, and often deceptive. To require him to make a diagram, showing the course or strike of the vein, would be vicious in the extreme. If he were bound by it, his rights would be concluded by a hap-hazard act of his—a mere guess on his part, about what he could have no certain knowledgs of. If he were not bound, others, relying on the diagram, might be misled to their great prejudice. To attribute such decisive importance to an act done under such circumstances is unreasonable.

If it be said that the claimant should not make his diagram until he has so far explored the mine as to be informed of its strike, the answer is easy. In order to determine the strike, the developement must necessarily be very extensive; the hanging and foot walls must be ascertained, and must be followed from the point of discovery for a very considerable distance. The walls of the Flagstaff were three hundred feet apart; the walls of the lode under consideration in the Eureka case were at one point eight hundred feet apart. (See the opinion of the court on page 312.) All this wide space of three hundred feet in one

case, and eight hundred in another must be excavated, and then excavations along each wall must be continued so far as to determine, not generally, but accurately, its definite course. Not less than one or two hundred feet along the walls must thus be traced. Less than this amount of work would be insufficient to answer the purpose, and less than a vast expenditure of money and labor would be unequal to do it.

And yet the statute requires an expenditure of only $1,000 before the diagram is filed; and not even that sum in explorations for the purpose of determining the strike, but to secure good faith in the making of claims.

The policy of the local laws and of the statute as well is to encourage discovery and protect the discoverer. (Atchison v. Peterson, 20 Wall. 507.) To require of him such an expenditure of labor and money as the contention on the other side renders necessary is to defeat that policy, and most thoroughly discourage discovery and withdraw all assistance from the discoverer.

Nor is there force in the contention that the diagram should show the true course of the lode in order to protect third parties; for to require that, is, as we have shown, to deprive the discovery and the discoverer of the protection and assistance which the statute was designed to afford. Any law which can be framed on this subject must involve prejudice to some one of several parties, claiming a vein which is obscure. If two have works on one lode without knowing that it is one lode, each may be ever so honest and just in his claims; his expenditures, however great, may be ever so innocently made; and yet one or the other must surrender to his rival; and the question only is which shall it be, the first or another locator. Custom, local law, the statute, and the whole policy of both has answered in favor of the former. Whatever may be said of hardship in behalf of the subsequent claimant, may be urged with still greater force in favor of the first.

2. The diagram required to be filed not being of the vein or lode, it is now submitted that it is to be of the surface ground. There is manifest propriety in requiring a diagram of the surface. It is necessary that its boundaries should be fixed; because, first, the land is conveyed in fee, and secondly, its extent not being prescribed either by the local laws or the act of Congress with precision, and being limited only by the convenience of the miner in working the vein, his notion of what he needs for the purpose alone governs, and the terms of the provision that this surface-ground or the diagram thereof shall be extended laterally to or across the vein or lode are apt.

Further terms of the statute support this view. Thus, to the clause of which we have been speaking, is added this: "And to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode." It would be most inapt to call a vein or lode, a tract—the vein or lode may not appear on the surface, and it may be a narrow seam between two walls of rock. And as the words "such tract" imply a tract previously mentioned, they require that the words "diagram of the same" be read diagram of the surface, which is the only "tract" mentioned in the act.

Again, the further clause, "And to receive a patent therefor, granting the mine, together with the right to follow the vein or lode," is to be considered. This provision is for a patent, first, of the tract, and secondly, of the mine. If the words "such tract" refer to the vein, there is a needless repetition in saying that a patent shall issue for that tract, that is for the vein, and that such patent shall grant "such mine." Used in that sense, "such tract" and "such mine" are precisely the same thing. A construction which produces such a repetition, and therefore gives no force to certain words, is inadmissible. On the other hand, if the words "such tract" are referred to the surface of which a diagram is to be filed, the clause

provides for a patent granting the tract of surface ground and the vein or the mine. This avoids any repetition and gives due force to each word in the sentence.

3. From this critical examination of the words and clauses of the act, we submit that it clearly appears that the diagram to be filed by the claimant in the local land office is a diagram of the surface ground, extending along or across the vein or lode so as to conform to local laws. And this being established, it follows that the surface ground is not required to cover the vein in its length; and, therefore, that its side-lines do not limit the right to follow it beyond them, even when running out of them on the strike. This is apparent from a moment's consideration of the provision itself.

Had the provision been simply that the surface ground or a diagram of it should be extended laterally along the vein or lode the boundary lines of the surface might define the vein; and there might be reason for saying that the limits of the surface measured the right to follow the lode. But the provision is that the surface or the diagram of it may be extended otherwise than laterally—that is, it may be extended across the lode, either at right angles or obliquely, or in any other conceivable way—the local laws, of course, being observed. If the surface be so taken, it could not possibly cover the vein on the length thereof, and there could be no side-lines to define it or the right to follow it.

4. The case as it stands on the statute is not changed by the local laws of the District. They do not touch this matter. They provide that the surface width shall not exceed fifty feet on each side of the walls of the vein; it might be less; it might be on one side and not on the other; it might extend laterally along the vein for the whole distance of two hundred feet in the case of one person, or three thousand feet in the case of an association of persons, or it might extend for a much less distance. It

would, of course, be otherwise, if the provision were affirmative, requiring that a surface width of fifty feet on each side of the walls of the vein shall be taken.

5. The construction here contended for has been the rule in the Land Department from the time it became charged with the administration of the statute.

The view taken of the law by the Land Office is stated in a letter under date of Nov. 10, 1871, addressed by Mr. Commissioner Drummond to the Register and Receiver at Salt Lake in reference to this very mine. In the course of it he says:

"It has been contended by some that the real object of the applicant is to secure a title to the vein or lode, and that the surface ground is merely an adjunct, immaterial to the real issue, and that its *locus* is determinable only upon the course of the lode, as ascertained by development after the location and record of the claim, and that the surface must coincide with the true course of the lode as ascertained.

"If this is the proper interpretation of the law, then the necessity of the diagram is not perceived. It certainly would be of no service to any adjoining or neighboring claimants in enabling them in determining what ground would be surveyed at the expiration of the ninety days, and under such construction of the law the applicant for a patent would be enabled to select that course for his survey which best suited his fancy, provided he used the same initial point, and if such final survey embraced any mines or miner's improvements, not belonging to the applicant, the owners thereof would be without redress, by reason of failure to present their adverse claims in time. It is not a survey of the lode that is required in these cases, but of the surface ground; a lode could not be properly surveyed until after it had been opened or developed in its entire extent. This is seldom the case in the application for mining patents received in this office, and it is ob-

vious that if a claim cannot be surveyed or patented until the exact course of the vein or lode has been first ascertained by developing it in its entire length, it would, in the majority of cases, be years before the title could be granted, and, as in some cases, the mine would in the meantime have become exhausted, a patent would be of no value, if then issued for it." (Copp, Mining Decisions, 67-68).

Such has ever since been the rule of the Department; and titles to vast properties throughout the mining region rest upon it. To change this rule is to do an incalculable mischief.

The opinion of the land office is entitled to the consideration of the court as a contemporaneous construction of the statute by a co-ordinate department of the Government, charged with its administration, and as a rule of property which has long obtained, upon the undisturbed maintenance of which the repose of many titles rest.

THIRD POINT.

The clause of section two of the act, providing that the patent should grant "such mine, together with the right to follow such vein or lode, with its dips, angles and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold, subject to this condition," confers, or more accurately speaking, confirms the right to follow it into adjoining land on its strike

1. Following a vein, is following it in its course, direction or strike; the idea of following the course, direction, or strike of the vein, is included in the idea of following the vein; the right to take the ore out of the vein, implies the right to take it out wherever the vein may be. To take a familiar illustration: If I say I have followed a trail, a river, a road, I say in effect that I have followed the trail, the river, the road, in the direction in which it runs; and to say so in words would be an awkward repetition. So when Congress said to the patentee, "you may follow

your vein or lode into adjoining lands," it said: "You may follow it on its strike into adjoining lands."

2. If the words, "with its dips, angles, and variations to any depth," were omitted, the construction would be indisputable. The clause would then read, a patent shall issue, "granting such mine, together with the right to follow such vein or lode, although it may enter the land adjoining." The contention of the other side is understood to be, that a lode entering adjoining land on its strike, and entering it on its dips, angles and variations, being two different modes, the expression of the latter excludes the former. Admit this to be true, yet the conclusion does not follow; because the right to follow the vein into the adjoining land on its strike, is given by the words, "the right to follow such vein," and the words "with its dips," etc., relate to the vein in its strike, and to the right to follow the vein in its course or direction. These words "dips, angles,and variations to any depth," are words, not of restriction or limitation, but of enlargement; and as said by Lord Holt, in Winter *v.* Loveden, (1 Ld. Raymond 267, 269.) "Where words tend to enlargement, they shall never be construed to be a restraint upon the former clause." (Earl of Cardigan v. Armitage, 2 Barn. & C., 197; Dunham & Sunderland Railway Co., v. Walker, 2 Q. B., 940, 966.

The clause therefore reads thus: A patent shall issue, granting such mine, together with the right to follow such vein or lode (in whatever direction it may run, that is, on its strike) with the dips, angles and variations (of the lode wherever it may be) to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition."

RECAPITULATION.

Collecting now the significations of the words and clauses, which in the course of this discussion we have ascertained, we confidently submit that the true reading of

the second section of the act of Congress is as follows: "Whenever any person * * claims a vein or lode * * having improved the same according to the local custom or rules of miners in the district, where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant * * to file in the local land office a diagram (of the surface ground) so extended laterally (to the vein) or otherwise (with reference to it) as to conform to the local laws, customs and rules of miners, and to enter such tract and receive a patent (granting such tract, and also) such mine, together with the right to follow such vein or lode (that is to follow it on its course or strike) with its dips, angles and variations to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition."

This reading renders all the terms and clauses consistent, and gives to each its due place and force.

FOURTH POINT.

The construction of the act for which we contend finds further support in the custom and usages of the mining districts.

This argument is of decisive force. It does not rest simply upon the rule that the Court may, in construing a Statute, inquire into the circumstances which gave occasion for its enactment. But these customs, rules, laws, are incorporated into, and made part of, the Statute. In the first section, the occupation and improvement of the vein by the claimant; in the second, the extension of that of which the diagram is to be made; and, in the fourth, the amount of surface ground; that is to say, all things going to fix the right to the claim, are subjected to those customs, rules, laws. And even the process of establishing

those rights in the Land Department, preliminary to the issue of the patent, is in strict accordance with them. In construing this particular Statute, then, these local laws are to be referred to, as if they formed a part of it, in terms, as well as in fact. (Atkinson v. Peterson, 20 Wall., 507.) But, it is also to be noted that the Statute adopts the laws, customs and rules of each several district for it—not any system of general prevalence for all.

Whatever of improvement may be required, and whatever of rights may be granted by the local laws of a particular district, that is the measure of what must be done, and may be enjoyed in the same district under the act of Congress, without any regard to the laws of another district. In this case, the Statute is to be read as if the laws of the Little Cottonwood Mining District were incorporated in it, and it is to be construed with reference to them. But, as the leading features of the laws of all the districts are much the same, they may be referred to as illustrative of the general scheme which prevails everywhere. Article 13, of the laws of the Little Cottonwood Mining District, is the only one touching this subject. It is as follows: "All claims shall be recorded within twenty days after location, and a blazed tree, stake, or board, shall designate the name of the lode, and the amount of ground claimed by the locators of the ledge, unless the parties shall hold the same by constant labor thereon."

Nothing here provides that the course or supposed course of the lode shall be indicated—simply the name of the lode and the amount of the ground claimed are required. The laws of the Eureka District differ from those of the Little Cottonwood in an important particular. They provide that "claims of mining ground should be made by posting a written notice on the claimant's ledge, *defining its boundaries, if possible.*" But if the claimant cannot define the boundaries of the ledge the necessary inference is he need not do so. In such case is he not to hold his

claim? Because he cannot define the side-lines of his claim does he take nothing?

The laws of the Mining Districts generally do not require that the surface ground claimed shall cover the vein, lode or ledge, nor even indicate the course of it; and when the claimant has in his notice described the strike of the vein, lode or ledge he is not, under the prevailant custom, held to it, if future developements show the description erroneous.

That in Nevada, the locator might follow his lode without regard to the surface, indeed, that he need not claim any surface appears from the opinion of the Court in the Bullion Mining Company v. the Crœsus Gold and Silver Mining Company, 2 Nevada, 168, 176, and Phillpots v. Brasdel, 8 Id., 61.

In "the Emma Mine Investigation," Senator Stewart testified with great fullness and directness about the customs of the miners in California, their nature, the circumstances of their origin and growth, and, especially touching the nature of this discussion. He showed that he possessed a long and personal experience in connection with mining. Considering the man, and the manner in which he speaks, his testimony should be taken as a most reliable statement of what those customs are. At page 214, he says:

"Q. Did that patent cover the Emma Mine in the direction of the lode?—A. Yes. I am glad you have asked me that questton. The patent was for the lode; and under the law of 1866, which existed until the passage of the law of 1872, they got a patent for so many feet on the lode, and they were authorized to follow the lode. It came up in this way: In early times in California, in locating quartz veins, they located so many feet on the lode. If the lode were under ground, and they could not tell where it was, they could not stake it. They started out without giving themselves any surface ground. I was at the first quartz meeting that was had in California, in 1851, I think

it was. We were entirely inexperienced in that matter, and we passed a code of laws whereby the miners should take so many feet along the lode, with all its dips, spurs, and angles, to any depth—follow it along on its dip. In carrying that into practical operation, it often happened that a party would locate so many feet on a lode running northerly, but, come to develop the lode, it would run in a different direction. That involved litigation in early times in California, and the courts of California held that the lode itself was the thing located. They took so many feet on the lode, and when the thing was developed, and they knew which way it would run, they could follow the lode, although it might not run in the direction indicated. That is to say, if it was "a thousand feet north," and it really ran northwest, still they could follow the lode. By the act of Congress of 1866, these rules and regulations were indorsed, and a provision made for obtaining a patent for the lode according to these rules and regulations; and the California courts held that the act of 1866 was merely permissive for parties to get patents—not to change their rights. There was a great prejudice against patents. The main object of that act was secured in the first section, which provided for confirming the possessory right. The balance of the act was a rather imperfect machinery for getting title; and it was not very material to anybody whether they did get title after they got the first; but they were permitted to obtain a patent for the lode, and they might follow down upon it, although it should enter on the land of another; that they could follow down on the dip, if following the lode.

"This application for the Emma Mine patent was under the law of 1866; the patent was for the lode, and that was one of the questions which arose on the argument of that case before Judge McKean. Of course, after getting a patent, when they came practically to work they would not follow the patent lines exactly. The Department here required that there should be some surface, and something

marked to indicate what the patent was for; but the lode being undeveloped, it turned out that it left the surface ground covered with a patent. The law of 1866 naturally required sufficient surface for the convenient working of the mine, and this patent for the surface did not amount to anything; it was a patent for the lode, and the making of the surface was an immaterial thing. But the Department did not know how to sell a piece of land without having some surface to go with it, and so they would have a survey making out a surface; but still the patent was the lode according to the rulings of the courts, which were well established and recognized.

"This, therefore, was a patent for the lode. The Emma patent did not follow, and it would be impossible to get one which did follow, the lode until the lode was developed. The lode is under ground. A lode enters into a hill, for instance, and there are different depressions in it; and as you follow the lode you may find it very crooked; although the first course of the lode might be straight, yet the difference in the altitude might make a good deal of difference. Of course a patent in which there is no ground allowed except for surface purposes, and that narrow, could not cover a lode of that kind. And in this case the question arose whether they were confined to the surface of the ground. This is an absurdity, because it is not a patent for the surface of the ground but a patent for the lode. It was a most absurd question for them to raise. The surface ground was given only for the convenient working of the lode, and the patent was for so many feet of the lode.

"We argued the case before Judge McKean, and produced before him the California authorities and proved the usages; and of course he held that we could follow the lode. That, however, was not at first the point in the Illinois case. What they first claimed was that this was another lode; but there was a bed of ore running right

straight along through, and as easily traced as the surface of this table almost."

But, in this particular case, the Defendant in Error cannot say that under the local laws the miner might not follow his vein beyond the side-lines of his claim, for the point of contact of the works of these parties was, as shown on the map, one hundred feet north of the north line of Tarbet's claim. If he was bound by those lines, then he had no right of action against the Flagstaff Company, none of its workings being within the lines of his claim.

Indeed, the Defendant in Error is understood to admit that under the local laws and customs of this Mining District, the side lines of the surface claim do not limit the right to follow the vein or lode, but that this limitation is imposed by the act of Congress. This position cannot be sustained, because it is well settled that that Act operates to confirm all the rights which were held under the local laws. (See cases cited above.)

In conclusion, it may be said by way of explanation, that the act of Congress, of 1872, materially changes the law as it stood under that of 1866, but it has no application here, because the Flagstaff patent was issued before it passed.

J. M. WOOLWORTH,

of Counsel for the Plaintiff in Error.

MINING SUIT.

"SIDE LINE" QUESTION.

SUPREME COURT OF THE UNITED STATES.

THE FLAGSTAFF SILVER MINING COMPANY, OF UTAH (LIMITED).

Plaintiff in Error,

VS.

HELEN TARBET,

Defendant in Error.

Brief and Argument for Defendant in Error.

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HELEN TARBET,
Defendant in Error.

Brief And Argument for Defendant in Error.

WRIT OF ERROR TO THE SUPREME COURT OF UTAH TERRITORY.

The defendant in error, in an action of trespass in the District Court for the Third Judicial District of Utah, recovered judgment against the plaintiff in error for $45,000 and costs, for entering and extracting ores from the SOUTH STAR AND TITUS LODE, Nos. 1, 2 and 3, and the judgment was affirmed in the Supreme Court of the Territory.

Numerous questions were raised on the trial and in the Supreme Court of the Territory, but only one question is raised here, and all other errors are expressly waived.

The error now urged raises this (to miners) very important question: *"Can the patentee of a mining claim follow the vein or lode on its course, or strike beyond the surface side lines of his claim?"*

Various instructions given and refused refer to this question, but it is only necessary to refer to two, to show this point was directly presented, to wit: the eighth instruction given at the request of defendant in error (Record, page 42) as follows:

"The defendant has not shown any title or color of title to any part of the vein, except so much of its length on the course as lies within the Flagstaff Surface, and the dip of the vein for that length; and it has shown no title or color of title to any of the surface of the South Star and Titus Mining Claim, except to so much of No. 3 as lies within the patented surface of the Flagstaff Mining Claim;" and the fourth instruction asked by plaintiff in error, and refused (Record, page 45) as follows: "By Act of Congress, of July 26, 1866, under which all these locations are claimed to have been made, it was the vein or lode of mineral that was located and claimed; the lode was the principal thing, and the surface area was a mere incident for the convenient working of the lode; the patent granted the lode. as such, irrespective of the surface area, which an applicant was not bound to claim; it was his convenience for working the lode that controlled his location of the surface area; and the patentee, under that act, takes a fee simple title to the lode to the full extent located and claimed under said act."

FACTS.

The Flagstaff Mining Claim was located 1000 feet northerly and 1000 feet southerly, March 19, 1870, (Record, p. 38) and with surface ground 100 feet wide. (Laws of Mountain Lake Mining District, Record, p. 62) Additional numbers were afterward located but their location is immaterial.

Patent was granted to the Salt Lake Mining Company, March 22d, 1872, and the patent is copied in the Record, p. 53, except the plat.

The Salt Lake Mining Company, Dec. 14, 1871, and pending application for patent, conveyed to the plaintiff in error the 2,000 feet covered by the original location, described as follows: "Consisting of 2,000 feet of said lode, vein or deposit, and being claims Nos. 1, 2, 3 and 4, northerly, and claims Nos. 1, 2, 3, 4 and 5, southerly; together with discovery claim as per location, filed in the Recorder's office for Little Cottonwood Mining District, on the 25th day of March, 1870," etc., (Record, p. 54)

The South Star and Titus Mining Claims were located October 1, 1867, (Record, p. 50) from a common discovery point; the South Star running by numbers southeasterly, and the Titus numbers northwesterly. Nos. 2 and 3 of the Titus were re-located on a claim of forfeiture for want of work, January 18, 1872. By deeds the title to 10 feet of the northwesterly end of No. 1, of the South Star, was acquired by the owners of the Titus, and this property has been known as the South Star & Titus; and the remainder of the South Star, less this 10 feet, has retained the name "South Star."

No. 1 of the Titus and 10 feet off No. 1 of the South Star, have been held under the location of 1867; Nos. 2 and 3 of the Titus under the re-location in 1872.

MAP.

In addition to the above facts, the map, with a few explanations, shows the whole case. The Flagstaff is surveyed north 36° east, and south 36° west, from the discovery point; the South Star and Titus, north 60° west. It was conceded by both parties on the trial that both locations are on the same vein (first instructions given for plaintiff in error, Record, p. 42) and that the general course or strike, at the surface, is from one to the other discovery point. The strike at a depth of from 300 to 600 feet is proximately

shown by the levels run northwesterly from the main Flagstaff incline. There are two "second levels," at the same depth, one of which is a "foot wall" and the other a "hanging wall" level, and they tend to show the strike, and also at that depth the proximate width of the vein. The difference between the strike at depth and the apparent strike at the surface, is accounted for by the rise of the mountain north and northwesterly from the South Star and Titus discovery.

The testimony of the engineer, Palmer, (Record, p. 30) shows the true strike at depth, is about north 50° west and south, 50° east; the dip is about at right angles with these courses and about north 40° east, as shown by a line drawn on the map, and the dip is from 45° to 47° from a horizontal. The map only shows a small part of the works of the South Star & Titus, but shows one connecting line of works. Whether, when a claim is located across the vein, in the situation of the Flagstaff, the surface side lines do not become end lines in legal effect, and as to rights in the vein, is a question not raised on the trial; the defendant in error, conceding the word *depth* in the Act of Congress is equivalent to the word *dip*, and that plaintiff in error was entitled to the length of lode covered by the patented surface, and the *dip* of that length, though it passed the side lines of the claim, and entered beneath the South Star & Titus surface; hence considerable testimony as to the true dip was taken not shown by the Record. Counsel for plaintiff in error, in the statement on p. 3 of his brief, omits this modification, but correctly cites the instruction which makes it. As the Flagstaff patented ground crosses the vein at nearly right angles, the facts present distinctly

THE MAIN QUESTION.

Under the law of Congress of 1866, is the vein located, held and granted, irrespective of surface ground containing it, and

can the grantee follow it on its course, outside of the surface lines of the claim?

FIRST.

The affirmative of the question stated is urged here by plaintiff in error, as it has been urged in other Courts.

Among other arguments used in such cases, it has been said such was the Spanish and Mexican law, and that the miners of the Pacific coast, many of them Mexicans, in the early days of mining on that coast, adopted analogous rules.

It is believed this is a mistake, and that no system of mining laws has existed in modern times, even where the miner worked under a license only and without any proprietary interest, by which the claim in the vein was not measured and regulated by surface bounds.

That the mining rules and customs in force in the mining States and Territories of the West were derived largely from the mining laws of Spain in force in Mexico, and of Mexico, there can be no doubt. Yale, in his work on Mining Claims and Water Rights (page 58) says: "The Spanish-American system which had grown up under the practical working of the mining ordinances for New Spain, was the foundation of the rules and customs adopted." "The miners of California have generally adopted, as being best suited to their peculiar wants, the main principles of the mining laws of Spain and Mexico, by which the right of property in mines is made to depend upon discovery and development; that is, discovery is made the source of title, and development or working the condition of the continuance of that title. These two principles constitute the basis of all our local laws and regulations respecting mining rights." DeFoos (Halleck's introduction) secs. 5 and 7.

A comparison of the mining ordinances, as shown in Gamboa's commentaries on the mining ordinances of Spain, and Rockwell on Spanish and Mexican Mining Law, with the rules and regulations of miners in the mining States and Territories of the West, will show conclusively that those rules and regulations are largely based upon the Spanish and Mexican ordinances.

By the mining ordinances of Spain of 1584 (ordinance 23) it was provided: "Also we ordain and command that any person who shall have discovered, or shall discover any new mine, and shall have made registry as directed by the last ordinance, shall enjoy a space of 160 varas in length upon the vein and eighty in width; and if he shall wish to measure out the said space of 160 varas and eighty varas crosswise upon the vein, he shall be at liberty to do so in such manner as he shall find most convenient." *1 Heathf, Gamboa, pages 274, 281, 283; Rockwell, Spanish and Mexican Laws, pages 221, 223 and 224.* By these ordinances the miner was restricted to the length of 160 varas upon the vein, and a width of 80 varas. It became a question, under the ordinance, whether the miner could follow on the underlay or dip of the vein outside of his side lines, and after much litigation it was decided that he could not so follow, even on the dip. *2 Heathf, Gamboa, 26, 27, 28; Rockwell, Spanish and Mexican Laws, 272, 273, 274.*

In his commentaries on the 30th ordinance Gamboa says: "Finally, the rule that the internal dimensions must correspond perpendicularly with the external limits, and all that is provided by the old and new ordinances for insuring precision in the measurement, and certainty in the position of the fixed stakes, would be completely frustrated. And had the miner a right to the whole underlay of the vein there would be no necessity for forming an oblong, nor for limiting the width to 80 varas; for

as to the surface, which is not the source of profit, the measurements are of no importance, whilst as to the interior it is ridiculous to talk of boundaries if the right to an indefinite extent upon the underlay be admitted." *Rockwell, 274.*

By the ordinances of 1783 the discoverer of a mine was allowed 200 varas on the course and direction of the vein (*Rockwell 57*); and "to make what they called a square" it was provided, that "where the vein was perpendicular to the horizon, 100 level yards should be measured on either side of the vein, or divided on both sides, as the miner might prefer." (*Rockwell 57*). But where the vein was in an inclined direction the miner should be allowed greater space in width, depending upon the inclination of the vein, allowing 200 feet in width where the angle of inclination reached 45 degrees (*Rockwell, pages 57 and 58*). Thus limiting the miner's right on the dip or underlay of the vein, in its greatest extent, to 200 varas; his claim being in that event 200 varas square, and limited underground by vertical lines corresponding with his surface boundaries.

If, therefore, our mining customs, rules and regulations have been derived from the Spanish and Mexican mining ordinances, the doctrine contended for by the plaintiff in error can find no support therefrom, as under those ordinances the vein could not be followed either on its strike or dip outside or across the lines of the location drawn vertically downward. It must be remembered, too, that in Spain and Mexico the right to mine was a *regalian right*, the mines vesting in the crown or the nation, as an estate separate and distinct from the surface estate. As to the mineral land belonging to our government there is no such divided estate. Our government owns these lands the same as any private person owns lands. *Moore vs. Shaw, 17 Cal., 199.*

SECOND.

When the act of Congress of 1866 was passed, the subject was a new one for legislation in that body, and it had not for a guide the advantage of the effect of prior legislation, or the long experience of any considerable number of the people in that branch of industry. Under such circumstances, it would not be expected that Congress should, and it did not, attempt to make a law embracing the whole subject of mining and miners' rights, and which would serve as a code defining their rights in mining property and take the place of the ordinary principles of jurisprudence. An examination of the act at once shows its main purpose to be to *provide for a sale of the mineral lands of the United States, with the minerals in those lands.* The laws existing providing for the sale of agricultural lands were not adapted to the subject matter, and in addition to providing for the sale of the mineral lands, it was necessary to limit the amount which could be taken by one locator, or an association of locators, to provide for the steps to be taken to acquire surveys and patent, the price per acre, and kindred subjects, all relating to the methods of disposition. With one modification of the common law, to be hereafter noticed, the rights of the miners as between themselves, and the protection of their property and interests, were left to their own customs and the principles of law applicable to all kinds of property. It was known that mineral lodes in their course downward departed from a perpendicular in nearly every conceivable angle between a perpendicular and horizontal, and the common law of boundary by vertical lines was inapplicable; therefore the common law was changed in one particular, that the owner of a mining claim might follow it to any *depth*, though it should enter land adjoining. This is the only change made in the common law, and in accordance with settled rules the change must be limited to the very

case provided for. The expression *depth*, is found in sections 2 and 4 of the act. No necessity existed for a change in the common law in respect to length on the lode, and *length* and *depth*, equivalent in miners' phrase to *strike* and *dip*, are distinguished with clearness in the act, where it is provided that one locator shall not take more than 300 feet in length, nor an association more than 3000 feet. Wherever in the act quantity is mentioned, it refers to length on the lode; the privilege of going to depth is a "right" following and depending on ownership on the course. That the vein was to be sold only in connection with the mineral lands, is not only apparent from the whole import of the act, but when the special provisions, for survey, platting, price per acre, &c., are considered, they are inapplicable to any other conclusion. Stress has been laid on that part of section 2 which provides for making a diagram of the lode, so extended laterally or otherwise, &c. It is enough to say in regard to this, that a survey and diagram of a lode, in the sense of vein, would be impossible and something entirely foreign to the purposes of the act. The Government did not expect a survey of the vein, nor propose to sell the vein at five dollars per acre, nor provide any method by which the contents of the vein could be estimated, superficially or otherwise. The word lode is frequently used by miners, and it may be found in the instructions and forms of the Commissioner of the Land Office in the sense of "mining claim." The words extended "laterally or otherwise," evidently refer to a subject matter concerning which the surveyor or party had some option or choice, and in respect to which they could make a change of location. Neither could extend the lode laterally or otherwise, but the diagram could show an extension of the surface ground, in such way as it had been claimed and held by the locator. The provision evidently means that, the claimant shall plat the ground which he claims

contains his lode, and make such an extension of surface ground, as to width, and shape and quantity, as he has held with the lode, in accordance with local customs. That Congress understood the surface ground measured the right to the lode except as to *depth*, is apparent from the last debate in the Senate, after which the bill immediately passed. Senators Stewart and Williams were the principal participants; the former advocating the bill, the latter opposing, principally because he was opposed to any *system of sale of the mineral lands;* but in reference to the latter part of section two, tho following occurred:

Mr. Williams.—I wish to invite the attention of the honorable Senators to another provision of the bill. I desire to understand the bill, at any rate. I find here that a person is allowed to enter a tract "and receive a patent therefor, granting such mine, together with the right to follow said vein or lode, with its dips, angles and variations, to any depth, although it may enter land adjoining which land shall be sold subject to this condition." Now, I desire to know if it is intended to allow the claimant to follow this vein, with its dips, angles and variations, *longitudinally* as well as *laterally?*

Mr. Conness.—I should like to inquire of the honorable Senator if he ever resided in a mining community or has had experience in connection with mines. I beg him to believe that my inquiry is simply to get a clear understanding of the point he raises.

Mr. Williams.—I presume the honorable Senator knows where I reside.

Mr. Conness.—I believe the Senator resides at Portland, and I do not think there are any veins there. I do not know, however, whether the honorable Senator has ever resided in the interior and become practically acquainted with the mining country. I desire to say to him, in this connection, that vein mines do not

enter the earth by perpendicular lines; but, on the contrary, have what are called dips or slants running by oblique lines into the earth; that they follow each other regularly in that respect; and that the custom now, and the habit everywhere, and the law, first determined by necessity, by the fact, next by the population obeying that necessity, next by the local courts affirming that necessity by their decisions, is that the miner is authorized to follow every vein according to its dips and angles and variations. This whole bill is based upon the principle of confirming what has grown out of necessity, the wisest system, perhaps, that could possibly be devised, which is the work of those people themselves. Would the Senator want to enter the earth by perpendicular lines, so that a man who owned a claim to-day, after he had descended fifty feet after it, should leave it to the ownership of another man to-morrow?

Mr. Williams.—I do not understand that the Senator has answered the question which I propounded upon the terms of the bill. I did not inquire as to the laws of the mining country at this time, but what does this bill provide upon that subject. Does it provide that these dips and angles and variations may be followed longitudinally as well as laterally, or only laterally?

Mr. Stewart.—No man living can make it clearer than the language of the bill.

Mr. Conness.—I was aware, and have been for the last three-quarters of an hour, that the Senator from Oregon did not understand this bill, and I am rather impressed with the belief that he cannot be made to understand it. I see that this remark excites merriment; but I assure the honorable Senator that I say it with all respect. It is not the cause of want of understanding of my honorable friend, who has so high a standing in my own estimation, certainly as high as he could possibly wish to have, but the want of an acquaintance, in all probability, with

a mining country. It is clear that the Senator does not comprehend the exigencies that belong to a mining country.

Mr. Williams.—The honorable Senator has not answered my question.

Mr. Conness.—No; I do not intend to answer it just as you put it.

Mr. Williams.—I know—

Mr. Stewart.—Allow me to answer. The fourth section contains this provision:

"Provided, That no location hereafter made shall exceed three hundred feet in length along the vein, for each locator, with an additional claim for discovery to the discoverer, with the right to follow such vein to any *depth*"—not to any length —"with all its dips, variations and angles, together with a reasonable quantity of surface for the convenient working of the same, as fixed by local rules." Dips, and angles and variations do not go longitudinally.

Mr. Conness.—That simply is no change; it is the law of the mines now.—*Congressional Globe, 1866, page* 3334

THIRD.

The act of Congress gives the local laws and customs of miners the force of law so far as they are not in conflict with superior laws.

The mining claims in question were situated in Mountain Lake Mining District until September 20th, 1869, when a new district was formed, called "Little Cottonwood." The local laws of both districts, from their organization to the time of trial, are in evidence.

The following articles of the Mountain Lake District are cited: Article 2, of July 20th, 1864 (Rec., p. 69), as follows: "The extent of a claim on any mineral vein shall be 200 feet

along the lode, with a width of 500 feet *on each side of the lode,*" &c. Article 2, of May 29th, 1866 (Rec., p. 72), as follows: "the extent of a claim on any mineral vein shall be 200 feet along the lode with a width of 100 feet *on either side,*" &c. Article 2 of August 30th, 1869 (Rec. p. 73), as follows: "The extent of a claim on any mineral vein shall be 200 feet along the lode, with a width of 100 feet *on either side,*" &c. Of the laws of Little Cottonwood, the following articles: Article 12, September, 1869 (Rec., p. 62), as follows: "The surface width requisite for mining or milling purposes, or for the convenient working of the same, shall not exceed 50 feet *on each side of the walls of said vein or lode;*" and Article 12, June 2d, 1870 (Rec., p. 64), as follows: "The surface width requisite for mining or milling purposes, or for the convenient working of the same, shall not exceed 50 feet *on each side of the walls of said vein or lode.*" The laws of numerous other districts have been examined, and no case has been found in which the surface ground is not limited to a given width "on each side of the vein," "on either side," "on each side of the centre of the vein," "on each side of the walls of the vein," or equivalent words. This shows, not only the laws of miners, but their understanding that surface ground is taken *on each side of and including the vein,* and conversely that, when the miner locates his surface, he locates and claims the vein within it. His right to the former defines and limits (except as to dip) his right to the latter.

The act of Congress of July 26th, 1866, provides, Sec. 2 (14 U. S. Statutes at Large, 251): "That wherever any person or association of persons claims a vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar or copper, *having previously occupied and improved the same according to the local customs or rules of miners in the district where the same is*

located," &c., "may enter such tract and receive a patent therefor," &c.

It will be seen that to obtain a patent, proof must be made to the Land Department that the applicant has previously occupied and improved the claim sought to be patented, according to the local customs or rules of miners in the district where the same is situated. By the customs and rules of the miners of Mountain Lake and Little Cottonwood Mining Districts a claim owner was entitled to his claim for the length claimed, limited in its linear extent by the act of Congress and the local rules, and with surface 50 feet wide *on each side of the vein, or of the walls of the vein.*

It must, therefore, be presumed in the case at bar that the patentee of the Flagstaff Mining Claim, predecessor in interest of the plaintiff in error, acting in conformity with the local rules and regulations of the miners, had occupied the Flagstaff Mining Claim, and improved the same to the linear extent claimed, and bounded by, and contained within, the surface width provided by those rules and regulations; and that, in applying for the patent, the patentee represented to the Government that it did so occupy, and that its vein or lode was included within the surface ground thus claimed, and a diagram of which was presented to the land office as a basis for the patent.

In view of this provision of the local customs and regulations, we do not see how it can be contended by the plaintiff in error, successfully, that it is entitled to search for its vein on its course outside of the side lines as described in its patent. If that were an open question, resting upon the act of Congress alone, more difficulty might be presented; but the provisions of the local laws seem to render this case free from any difficulty in that regard, by restricting the right of the plaintiff in error under this

patent to such parts of the vein as in its strike or longitudinal course, are found within the side lines of the patent survey.

FOURTH.

Counsel for plaintiff in error in his brief (page 8) says: "The act of Congress of 1866, in its second section, gives the right to follow the vein or lode, although it may enter the land adjoining." Upon this statement arises the radical error, in our judgment, which lies at the basis of the claim of the plaintiff in error. It is not true, in our view, that the act of Congress, either in the second or any other section, gives the right to follow the vein or lode, although it may enter the land adjoining, except in depth and on the dip of the vein. In section two of that act it is provided, among other things, that the applicant for a patent, certain preliminary requirements having been complied with, may enter such tract, meaning the tract of which a diagram has been made, and receive a patent therefor, "granting such mine, together with the right to follow such vein or lode, with its dips, angles and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition."

By section 4 of that act it is provided: "That no location hereafter made shall exceed 200 feet in length along the vein, for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein to any depth, with all its dips, variations and angles, together with a reasonable quantity of surface for the convenient working of the same, as fixed by local rules."

It will be seen by a comparison of these sections that the right to follow the vein is treated of in each section, the form of expression being different in each; the first being "to follow such vein or lode, with its dips, angles and variations to any depth,"

the second being "to follow such vein to any depth with all its dips, variations and angles." If there can be any doubt as to the construction of these words as used in section 2 and as limited by the word "depth," there certainly cannot be any as to the words employed in section four, as expressly confined to depth, and cannot by any construction be made to apply to the strike or course of the vein.

But there does not seem to be any doubt as to the construction of the words used in section 2. The right to follow the vein or lode there applies to depth only, as a careful reading must show.

The third section of said act provides for filing a diagram of the claims in the local land office; posting the same in a conspicuous place on the claim; publishing notice of application in a newspaper; posting notice and diagram in the local land office; final survey; proof of publication; posting, &c.; entering and paying for the land and for the transmitting of the plat, survey, and description to the General Land Office; and it is therein provided, "But said plat, survey or description shall in no case *cover* more than one vein or lode, and no patent shall issue for more than one vein or lode, which shall be expressed in the patent issued." Under the requirements of this section, an applicant for a patent having located, occupied and improved his claim in conformity with the local rules and regulations of the miners of the district in which it is situated, may file a diagram of his claim, so occupied and improved, in the local land office, and upon taking certain proceedings, may prosecute that application to patent. He is required to cause a notice of his application, together with the diagram, to be posted in a conspicuous place on the claim. The manifest object of this is to give notice to adjoining claimants, and to all parties interested, as to the extent of his claim, in order that they may have the

opportunity to contest his right to the patent for which he is applying.

In addition to this posting the Register of the Land Office is required to publish a notice of the application in the newspaper published nearest to the location of said claim, and to post such notice in his office for a period of ninety days, thus giving to all concerned additional notice as to the purpose of the applicant, and an opportunity to any person or persons desiring to contest said application to do so.

Now, can it be successfully contended that the notice relates simply to the surface ground described in the diagram, and that any contest against said application must relate simply to such surface ground? It seems clear that such could not have been the intention of the law-makers in this enactment.

Counsel for plaintiff in error contend stoutly that the surface ground is but an adjunct or accessory to the lode or vein claimed, the lode or vein being the principal thing sought to be secured by the patent. It is undoubtedly true that the mineral vein is in all cases the valuable thing which is sought by the miner. We argue, therefore, that the opportunity provided by the law for contestants, relates to the vein or lode as well, and that when the applicant posts and publishes his notice to the world, he, in substance, represents not only to the government, but to all concerned, that he claims his vein or lode to be within, and bounded by, the plat of ground which he has described in his diagram. Indeed, it would be idle and quite illusory if this were not so. It can hardly be supposed that an adjoining claimant would contest with the applicant for a patent the right merely to surface ground, which in itself would be of little or no value; while he would be vastly interested, perhaps, in contesting the right of the applicant to any part of a vein or lode which might lie outside of the surface described in the diagram.

Stress is laid, somewhat, on the hardships which might result to a prior locator if he were not allowed to follow his vein outside of his surface side lines; but it should be borne in mind that he is required by the act of Congress (section 2) to show to the government, as a necessary part of his application for a patent, that he has not only occupied and improved his claim according to local laws, but that he has expended in actual labor and improvements thereon an amount of not less than one thousand dollars. By this expenditure he may be presumed to have fairly determined, to his own satisfaction at least, the course or direction of his vein, as well as whether it is of value sufficient to justify the expense and trouble of an application for a patent.

Then, again, the Government does not guarantee a vein or lode to those who shall apply for patents, but simply promises a patent to such as go upon and explore the public domain, and, having made such exploration, represent to the Government what they claim to have discovered, and where it is located.

It would seem that, if any hardship is to result, it would certainly follow from such a construction of the Act of Congress as is contended for by the plaintiff in error; and the case at bar is an apt illustration of the hardship of such a construction.

The locators of the Flagstaff Mining Claim located their claim, and filed their notice claiming the lode northerly and southerly. They applied for and obtained a patent for the claim substantially in the same direction, being north 36 degrees east, south 36 degrees west. Prior to the location of that claim the Titus claim had been located by the grantors of the defendant in error at a point about 500 feet southeasterly from the point where the Flagstaff claim was subsequently located. The locators of the Titus claim claimed their lode

northwesterly and southeasterly, substantially with the true course of the lode. If the construction contended for by the plaintiff in error prevails, then a prior locator, who was fortunate or wise enough to make his location correctly, so as to cover the vein or lode, after having expended large sums of money in its development, will be deprived of the benefit of his good fortune or wisdom, and of his expenditures, by a locator who, designedly, carelessly or ignorantly, makes a location not embracing the vein.

Further confirmation of our view of this case, we think, is to be found in that part of Section 4 of said Act, which provides: "Said plat, survey or description shall in no case cover more than one vein or lode, and no patent shall issue for more than one vein or lode, which shall be expressed in the patent issued." While the word "*cover*," as used in the phrase above quoted, may be intended to mean no more than that but one vein shall be conveyed with a given amount of surface ground, yet we think its use quite clearly shows that the conveyance and holding of the lode, by and under the patent, was intended to attach to and be limited by the surface granted. If this were not so, what description of the lode granted can be found in the patent in this case? Clearly there is no description, unless the boundaries of the surface be such. The patent purports to convey, with the surface, 2,600 linear feet of the Flagstaff lode. Where will be found either the northerly or southerly limit, or any limit of the lode, unless it be found in connection with the surface description or limited by the surface description?

Under the Act of 1866, as well as under the Act of 1872, it is necessary that there shall be end lines to the claim, and those end lines, under the previous Act, are to limit, bound and define the length of the claim. If the construction contended for by the plaintiff in error is correct, how is it possible to find

end lines in this patent which shall limit, bound and define the claim of the plaintiff in error on this vein? Such a construction would substantially defeat the limitation of quantity on the ledge provided by the Act of Congress and the local laws.

His Honor, Mr. Justice Field, in the case of the Eureka Consolidated Mining Company *vs.* The Richmond Mining Company, of Nevada, in the Circuit Court for the Ninth Circuit, rendering the decision of the Court in that case, says: "Now, as neither the rules of miners in Eureka Mining District, nor the Act of 1866, in terms, speak of end lines to locations made on ledges, nor in terms impose any limitations upon miners following these veins wherever they may lead, it is contended that no such limitation can be considered as having existed, and be enforced against the defendant. The Act of 1866, it is said, recognizes the right of the locator to follow his vein outside of any end lines drawn vertically down, when it permits him to obtain a patent granting his mine, 'together with the right to follow such vein or lode, with its dips, angles and variations, to any depth; although it may enter the land adjoining, which land adjoining shall be sold subject to this condition.'

"It is true that end lines are not in terms named in the rules of miners; but they are necessarily implied, and no reasonable construction can be given to them without such implication. What the miners meant by allowing a certain number of feet on a ledge was, that each locator might follow his vein for that distance on the course of the ledge, and to any depth within that distance. So much of the ledge he was permitted to hold as lay within vertical planes drawn down through the end lines of his location, and could be measured anywhere by the feet on the surface. If this were not so, he might, by the bend of his vein, hold under the surface, along the course of the ledge, double or treble the amount he could take on the surface.

Indeed, instead of being limited by the number of feet prescribed by the rules, he might, in some cases, oust all his neighbors and take the whole ledge. No construction is permissible which would substantially defeat the limitation of quantity on the ledge, which was the most important provision of the whole system of rules."

Again, he says: "The Act of 1866 in no respect enlarges the right of the claimant beyond that which the rules of the mining district gave him. The patent which the Act allows him to obtain does not authorize him to go outside of the end lines of his claim drawn down vertically through the ledge or lode. It only authorizes him to follow his vein, with its dips, angles and variations, to any depth, although it may enter the land adjoining; that is, land lying beyond the area included within his surface lines; it is land lying on the side of the claim, not on the ends of it, which may be entered; the land on the ends is reserved for other claimants to explore. It is true, as stated by the defendant, that the surface land taken up in connection with the linear location in ledge or lode, is, under the Act of 1866, intended solely for the convenient working of the mine, and does not measure the miner's right either to the linear feet upon its course, or to follow the dips, angles and variations of the vein, or control the direction he shall take; but the line of location does measure the extent of the miner's right. That must be along the general course or strike, as it is termed, of the ledge or lode. Lines drawn vertically down through the ledge or lode at right angles with a line representing this general course at the end of the claimant's line of location, will carve out, so to speak, a section of the ledge or lode within which he is permitted to work, and out of which he cannot pass."—*4 Sawyer, 311.*

While the exact question presented in this case was not di-

rectly involved in the Richmond–Eureka case, yet it is believed the language above quoted from the opinion of the Court in that case substantially supports the claim of the defendant in error in this case; and while the language from that opinion, quoted at page 14 in the brief of counsel for the plaintiff in error in this case, may seem at first glance to be antagonistic to our position, yet we submit that that language, read in connection with what precedes and follows it in the opinion, sustains our position.

The question here presented is one of vast importance to the mining communities of this country, and although it has been much mooted, there have been only two decisions by courts of last resort in any of the States or Territories, to our knowledge. One is the decision now brought before the Court for review, and the other a decision of the Supreme Court of Colorado, in the case of "Wolfley and Skinner vs. Lebanon Mining Company," a report of which has not yet appeared, to our knowledge, in any volume of reports. That Court in that case holds the doctrine for which we contend here; and as the question is there well discussed, by leave of the Court, we will present it entire as part of our brief, as follows:

"This was an action of ejectment, brought by appellees against appellants to recover the possession of eight hundred feet of the Ben. Harding Lode. The declaration contained three counts, in the first of which the appellees claimed title in fee, and in the second and third it claimed title by pre-emption, occupation, possession and purchase under and by virtue of the local laws, customs and usages of miners in Griffin Mining District, the laws of Colorado and those of the United States. In support of the second and third counts, much evidence was introduced, which, however, the Court charged the jury to disregard in the following instructions:

"'After the issuing of the patent, all previously acquired rights by the patentee under the local laws, usages and customs of the particular district in which the claim is located are merged in the patent, and the plaintiff, having put in evidence a patent from the United States, you must not consider the right or title acquired prior to the issuing of the patent, such rights being merged in the patent.'

"Whether this instruction correctly lays down the law, we need not decide. It could not prejudice the defendant. It is enough to say that by this instruction the jury was necessarily confined to the issue made upon the first count. By their verdict they found that the plaintiff was the owner in fee of the property described in the declaration. This verdict was responsive only to the first count.

"The evidence tended to show that the Ben. Harding lode, in its general course or strike, departed from the vertical side lines of the location described in the patent, and represented by the plat incorporated therein, and entered the Bell Tunnel Lode location, which was patented under the Act of Congress of May 10, A. D. 1872; that the plaintiff had the right to so follow the patented lode was affirmed in the instructions of the Court. Upon this theory the case was tried. To determine its correctness reference must be had to the Act of Congress of July 26, 1866, under which the Ben. Harding was patented.

"At common law, a grant of land carries with it all that lies beneath the surface down to the centre of the earth. At his pleasure the owner of the soil may apply to his own purposes whatever is included in the segment of the earth carved out by his descending exterior boundary lines. Says Sir Wm. Blackstone, (book 2, p. 18): "*Cujus est solum, ejus est usque ad cœlum,*" is the maxim of the law; upwards, therefore, no man may erect any building, or the like, to overhang other land; and

downwards whatever is in a direct line, between the surface of any land and the centre of the earth, belongs to the owner of the surface, as is every day's experience in the mining countries.

"By the rules of the common law, except so far as such rules have been modified by statute, must the extent of the plaintiff's patented grant be determined. That there may, however, be a grant of mineral separate from the grant of the circumjacent land, and *vice versa*, where the grantor manifestly intended that each shall form a distinct possession and different inheritance, admits of no doubt. The question recurs: What did Congress, by its declared will in the Act of 1866, authorize the United States to grant? In the light of a just interpretation of this Act must the Ben Harding patent be construed. If the patent is broader than the law, it is, to that extent, ineffectual. Based upon the statute, its validity, and the extent to which it operates as a conveyance, must be determined by reference to the statute.

"Section 2 provides that, it shall be lawful for the claimant of a vein or lode 'To file in the local land office a diagram of the same so extended, laterally or otherwise, as to conform to the local laws, customs and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode, with its dips, angles and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition.'"

"This section clearly permits the patentee to follow the lode in its descending course to any depth, although in its downward tend it is carried by its dips, angles and variations into the adjoining land. Here is a departure from the common law doctrine. The qualifying words, however, "to any depth,"

limit the direction in which the mine may be pushed beyond the side lines. The claimant is required to file in the land office, a diagram of his vein or lode. This is his own act. The law contemplate that before he prepares his diagram he shall so far expose and develop the lode as to be able to trace its course. The position that if the plat made by the surveyor does not cover the lode, the patentee should be permitted to shift the lines of his patent so as to include the lode, which he before, through his ignorance or indolence, failed to locate, it is conceived is without force. The error is not the mistake of the government officers but the mistake of a claimant, and others ought not to be permitted to suffer by it. It is not the province of the surveyor to either discover or determine the course of the vein. He acts under the directions of the claimant of the mine, who has already furnished a diagram of his lode. His duties are to survey the located premises, and make a plat thereof, indorsed with his approval, designating the number and description of the location, the value of the labor and improvements, and the character of the vein exposed. (See section 3). However tortuous might be the course of the lode, the claimant has a perfect right to follow it up and prepare his diagram so as to include it, together with the surface ground on each side thereof allowed by local laws.

"There is no language in the act that requires the diagram to be in the form of a parallelogram or in any other particular form.

"From an examination of the entire act it seems to us that the central idea of a mining location under its provisions is, that there must be a discovered lode within it, whose *locus*, in its general course, is embraced within its boundaries.

"An assumed mining location, which, in fact, contains no mine, would be wholly false, and would contravene the law, until a patent issues. To the extent only in its downward course that a

discovered lode is within the prescribed exterior boundaries of the claim, is the location itself unassailable. ***Patterson vs. Hitchcock, decided this term.***

"The surface ground and the lode are not independent grants. It is not the purpose of the act to grant surface ground without a discovered ledge. The lode is the principal thing and the surface ground incident thereto. In conveying a segment of the earth located under the provisions of the act it is the intention of Congress to convey a mine contained within that segment as the substance of the grant.

"The act appeals to the industry and enterprise of the miner, to make sure that the lode is within his location. The higher his diligence in this respect the greater will be his reward. If by lack of assiduity and energy he makes an untrue location—a location not embracing the lode he seeks to secure—he cannot be heard to complain that others have explored and discovered a lode thereon which might have been embraced in his diagram.

"If, as the evidence tends to show, the Bell Tunnel lode is a continuation of the Ben Harding lode (after its departure from the vertical side lines) extending through the adjacent location, upon what principle of justice or law, in the absence of an express statutory provision, can the patentee of the lode last named claim the right to encroach upon premises embraced by the Bell Tunnel lode location and deprive the owner thereof of the fruits of his discovery?

"Before a claimant is entitled to a patent under the act of 1866, a compliance with its provisions is indispensible. It is necessary that a diagram of the lode claimed shall be filed in the local land office. Notice of the extent of the claim must be given to the world by posting such diagram in a conspicuous place thereon, together with declaration of the claimant's intention to ap-

ply for patent. The Register of the Land Office is required to give a like notice by publication in a newspaper, and by posting it in his office for a period of ninety days, which is in effect a summons to all persons whose interest may be affected by the issuance of a patent in conformity with the diagram, to appear and file an adverse claim. If, after the expiration of ninety days, no one appears to contest, the surveyor general, upon application of the claimant, is required to survey the location and make an approved plat thereof, and designate the number and description of the lode, the value of the labor and improvements, and the character of the vein exposed. For what purpose must these several acts be done? Do they not point with certainty to a segregation from the public domain of a described tract embracing a lode? If they have any significance, we are constrained to the conclusion that one of their leading objects is to require that the claimant shall, before applying for a patent, ascertain the exact location of his lode, and fix that location by his diagram so that the public may be apprised of the limit of the lode location; and may thereafter with safety explore and occupy adjacent tracts.

"It is apparent that within the meaning of the act, the lode claimed is to be fixed by reference to the "plat and survey" of the location; and although in pursuance of its provisions, the lode in its descending course may be followed to any depth with its dips, angles and variations, into the premises adjoining, in its general strike or course, it may not depart from the line of the location.

"It is, however, insisted that if not the precise terms of the act of July, 1866, then by virtue of territorial legislation, and local customs and rules of miners, the patentee was entitled to follow the course of the discovered lode, whether it was comprised within this location or not; that one of the purposes of the act

of Congress was to recognize and confirm mining rights and titles as they existed under local laws and customs.

"The act provides that the mineral lands of the public domain are free and open to exploration and occupation, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States. Before the passage of this act, with a view to protect the miner in the occupation of the public domain, although he was technically a trespasser as against the United States, the courts held that as between him and a third person, he might be considered as being in possession with the assumed consent of the owner. But by that act the assent of the United States to the exploration, occupation and purchase of mineral lands of the public domain, is expressly declared. Under its provisions the miner, having located his claim, is to be treated as an express licensee of the United States, and, independent of a purchase from the Government of his mining claim, he has, upon a compliance with the terms of the act, a right to appropriate the minerals therein contained. A title in fee by patent is offered him, which he may at his pleasure accept or reject. By the statute his rights are circumscribed and determined. The act of Congress from which they sprung is paramount to all local laws, rules and customs. The first section of the act we think leaves no room for doubt on this point. As long as they are not in conflict with the laws of the United States, they are of binding force and must be observed; but the act of Congress cannot be subordinated to the local laws, rules and customs. It is in the light of its provision that every patent issued in pursuance thereof must be construed, and we cannot therefore admit that any such patent can, by virtue of local laws and customs, transfer to the patentee any greater interest or estate than that which the paramount law warrants.

"In the case of Chapman vs. Toy Long, 4 Sawyer, 34, the court, commenting upon the rights of the miner upon the public domain since the passage of the act of 1866 and subsequent acts upon the same subject, says:

"'But under the mining laws of the United States, now in force, the locator of a mining claim, as to the right to the possession of the premises and to appropriate minerals therein, becomes and is the assignee—licensee—of the United States so long as the law remains in force and he complies with the conditions imposed in it. Until Congress withdraws this license by a repeal of the law, the right of the locator to the possession of his claim, and to appropriate to his own use the mineral deposits therein, is full and complete, and he need not take any steps to purchase the land or obtain a patent for it. That is a matter left to his own option or sense of self-interest.'

"There is no time prescribed within which he shall apply for a patent. Ample opportunity to ascertain the precise *situs* of his lode with reference to the contiguous land is given him. The surface and the lode are both the subject of the grant. The patent operates to convey not only the circumscribed tract of land which, under the claimant's direction, has been platted, but also the lode contained therein, with the right to follow the same in its downward course into adjoining premises, but not to follow it when, in its general strike, it departs from the vertical side lines. In the latter case, after its departure it is the subject of location by whomsoever it may be discovered.

"If then, as the evidence tends to show, the ledge on which the Ben Harding lode was located, deflected in its general strike from the patented side lines, the patentee is not entitled, in virtue of his patent, to its possession beyond the side lines, as against one who has subsequently located and patented it.

"Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion."

FIFTH.

(*a*) Counsel for plaintiff in error claims that the patent issued in this case, by its terms grants two distinct estates; one being 2600 linear feet of the vein, the other, the surface ground; and quotes from the recitals of the patent to enforce this claim. Let us see. Here is the entire recital preceding the description: "Whereas, in pursuance of the act of Congress approved July 26, 1866, 'granting the right of way to ditch and canal owners over the public lands, and for other purposes,' there have been deposited in the General Land Office of the United States, the plat and field notes of the survey of the claim of the *Salt Lake Mining Company* for twenty-six hundred (2,600) linear feet of the Flagstaff lode, accompanied by the certificate of the Register of the Land Office, at Salt Lake, in the Territory of Utah, whereby it appears that in pursuance of said act of Congress, the said *Salt Lake Mining Company* did, on the 18th day of September, A. D. 1871, enter and pay for said claim, being mineral entry number 4, in the series of said office, designated as lot number 38, forming a portion of the unsurveyed public domain, in the Little Cottonwood Mining District, in the district of lands subject to sale at Salt Lake City, embracing twenty-six hundred (2,600) linear feet of the Flagstaff lode, bearing silver, with surface ground, as hereinafter described, for the convenient working of the mine, and according to the returns on file in the General Land Office, bounded, described and platted as follows," &c.

Now it is recited that, the plat and field notes filed, &c., were of the applicant's claim for 2600 feet of the lode, that is, mining claim. It is further recited that the applicant had entered and paid for said claim, that is, the claim which had been

surveyed, viz: 2600 feet of the lode, being mineral entry number 4, designated as lot number 38, forming a portion of the unsurveyed public domain, *embracing*, that is the survey, mineral entry and lot, embracing twenty-six hundred linear feet of the Flagstaff lode, bearing silver, with surface ground (that is embracing the 2600 feet and surface ground,) as hereinafter described, for the convenient working of the mine, and according to the returns, &c., bounded and described and platted as follows: (giving the description.)

We have then, (1) The plat and field notes of survey of a claim for 2,600 feet of the lode. (2) That claim, as surveyed, is paid for as entry No. 4, Lot No. 38. (3) Entry No. 4, Lot 38 embraces 2,600 feet of the lode, with surface ground. (4) Entry No. 4, Lot 38, thus embracing 2,600 feet of the lode and surface ground, according to the returns required by law to be made, viz: the plat and field notes, bounded, described and platted by metes and bounds according to the survey.

In view of this analysis of the recitals in this patent, what becomes of the claim that two estates are patented? But one estate is spoken of. All that is to be patented is embraced in Lot 38. Lot 38 is the claim on the lode that was surveyed; the survey was of surface, described by metes and bounds. Lot 38 was conveyed by metes and bounds, according to the survey as platted. If, therefore, the vein, or any part of it, passed by this patent, it passed as part and parcel of this surveyed claim—this entry and lot—this definitely surveyed and described parcel of the mineral domain. The only words which can be found in the grant which in any way enlarge the right which would have been acquired under a common land patent for this Lot 38, are those found in the granting clause: "With the right to follow said Flagstaff vein or lode to the distance of

2,600 linear feet, with its dips, angles and variations, *to any* depth, although it may enter the land adjoining."

These words, we contend, only enlarge the common law right in one respect, viz: so as to allow the patentee to follow the vein in its downward course in the dip to any depth, though, in so doing, he may pass beyond the surface side lines, drawn vertically downward, and enter land adjoining.

But we have sufficiently stated our views as to that question, and will not pursue it further.

(*b*) It is claimed that the construction contended for by the plaintiff in error has been the rule of the Land Department from the time it became charged with the administration of the statute, and that the opinion of that Department is entitled to the consideration of this Court, as a contemporaneous construction of the statute by a co-ordinate Department of the Government, and as a rule of property which has long obtained upon the undisturbed maintenance of which the repose of many titles rests.

Of this claim we have only to say: As we understand it, the Land Department has not the power, nor has it ever undertaken to exercise the power, to construe the statute in this regard.

Certain preliminary requirements being complied with, and proper proofs thereof being presented to it, the Land Department must issue a patent. Its powers and duties in that regard are purely administrative, and it has no power whatever to decide either what a given patent grants or what the law-makers intended it should grant.

Upon an examination of Copp's Mining Decisions, cited by counsel, it will be found that most, if not all, of the expressions of the department on this question are contained in letters

answering private enquiries, and that many of them are by subordinates in the department.

It would be strange, indeed, if the Commissioner of the General Land Office, by a letter, such as is quoted at page 22 of the brief for plaintiff in error, could decide such a question as this and establish a rule of property which should have the effect to nullify the manifest intent of the statute, and sweep away, no telling how many valuable vested rights in mineral lands. If such were the case, while a few titles might be left in repose, by far the greater number would be thrown into a state of the greatest disturbance. Certainly, such opinions can have no weight as opinions. If they are based on reasonable and sound principles of construction, those principles will have weight, but not because the commissioner has written letters announcing them.

(c) Counsel for plaintiff in error cites from the testimony of Ex-Senator Stewart, given in the "Emma Mine Investigation," touching the customs of miners; the statute of 1866, and the application of the construction here contended for, by Judge McKeen, in a litigation concerning the Emma Mine.

It must be said, this is a novel kind of authority to present to this Court, being neither testimony in this case nor adjudged law.

But, waiving that, as to the construction of the Act of Congress, of 1866, and with due respect towards the Senator, let us "appeal from Philip drunk to Philip sober." When in his place in the Senate, he was advocating the passage of the Act of July 26, 1866, the Senator stated to the Senate, when interrogated thereto by Senator Williams, that the Act gives "the right to follow such vein to any *depth*—not to any length —with all its dips, variations and angles," etc.—*Congressional*

Globe, above cited. The Senate passed the bill and the bill became a law.

Then he was legislating presumably for the good of all concerned. When he gave his testimony before the Committee of Congress having in charge the "Emma Mine Investigation," he was engaged in an effort to extricate himself and friends from an embarrassing difficulty, and he rather argues than testifies for a construction of the Act opposite to that which he gave to the Senate as one of the inducements to pass the bill and enact the law.

We will hold the Senator to his first statement.

He says: (p. 29, plaintiff's brief) "We argued the case before Judge McKean, and produced before him the California authorities, and proved the usages, and of course he held that we could follow the lode."

As to this statement we beg leave to say, the writer of this brief was of counsel in that case, opposed to the Senator. On that hearing no California cases were cited to sustain the Senator's position on the question then and now under discussion, and for the very good reason that none such existed. And, be it said, no such decision or decisions have ever been made by any court in California or elsewhere, entitled to the least respect.

As to the statement, "And *of course* he held, that we could follow the lode," we say OF COURSE he did, and granted an injunction, with a writ of possession in its belly.

(*d*) Counsel says: "Indeed the defendant in error, is understood to admit that under the local laws and customs of this mining district, the side lines of the surface claim do not limit the right to follow the vein or lode, but that this limitation is imposed by the act of Congress." He is quite mistaken. We

claim that by the provisions of the local laws heretofore cited, the miners have restricted their rights in this regard, as we have argued above.

(*e*) We submit that the act of 1872 is to be received in the light of a legislative construction of the act of 1866.

(*f*) Counsel claims that the owners of the South Star and Titus have gone beyond the side lines of their claim, and that the point of contact is beyond those lines. (Brief, page 30). That is true; but a glance at the map will show that the point of contact (Map, letter *k*), is on the *dip* of the vein, and directly connected with discovery point by workings on the *dip*.

FINALLY,

We insist therefore, that the patent in this case grants and conveys to the patentee that part of the public domain described therein by metes and bounds, and that the patentee takes the whole estate above, below, and at the surface, on strict, common law principles, with the single exception, that he may follow the lode from the apex found within the surface ground and to the extent of the apex so found within said surface, on its dip to any depth, although in its course downward it may so far depart from a perpendicular as to enter land adjoining.

Perhaps a word should be said as to the great importance of this question. It may be safely said that there is not a mining district discovered prior to May 10th, 1872, (the date of the passage of the existing mining act of Congress) in any of the mining States or Territories of our country, in which this question has not arisen, or will not arise. Great care should therefore be taken to establish such a construction as will be just, and we submit that a construction that departs as little as pos-

sible from the general laws relating to the tenure and title of real estate, must be the just one. If those well-established rules are to be varied, modified or abrogated, the warrant for so doing should be clearly and expressly given by the law-making power.

Confident that this question will receive the care and consideration from this august court, which its importance deserves, we now submit the case.

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